Supreme Court, U.S.
FILED

06 1481 MAY 09 2007

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

HARRY McNAMARA, *et al.*,

Petitioners,

v.

CITY OF RITTMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVE J. EDWARDS
(Counsel of Record)
4030 Broadway
Grove City, Ohio 43123
(614) 875-6661
Attorney for Petitioners.

Washington, D.C. • THIEL PRESS • (202) 328-3288

QUESTIONS PRESENTED

In *San Remo Hotel, L.P. v. City and County of San Francisco,* 125 S.Ct. 2491, 2507, (2005), four concurring justices believed "our decision in *Williamson County*... may have been mistaken." They wrote: It is not clear ... that *Williamson County* was correct in demanding that ... the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 125 S.Ct. at 2508. The court of appeals, however, has held that if Petitioners want compensation for a taking under a "continuing violation" theory, they must first seek compensation in state court including state common law tort remedies.

1. Whether a Fifth Amendment takings claimant must first seek compensation in state court under state takings law, including state common law tort remedies, as a necessary step before bringing a federal takings claim in federal court?

Petitioners filed a state court action for a monetary remedy from the city, alleging that the drilling of wells on nearby land caused "unreasonable dewatering," a cause of action under Ohio law. Petitioners did not receive monetary relief in state court, so within a year they filed suit in federal court seeking just compensation under the Fifth Amendment. The court of appeals held that the federal claim for "past violations" of the Takings Clause was time-barred, because the Fifth Amendment claim accrued when Petitioners "knew or should have known of the underlying injury." The court of appeals is in conflict with other federal circuits which have held, following "*Williamson County*

Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), that a Fifth Amendment takings claim does not accrue until it becomes ripe, after state procedures are pursued and monetary relief is denied.

2. Whether a Fifth Amendment takings claim accrues when the claimant first knew or should have known of his injury, or after a claimant has sought and been denied compensation in state court?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are Harry McNamara, Dale Palmer, Carol Palmer, Thomas E. Dysinger, Dana Dysinger, Troy Pertee, Dianne Pertee, Howard Hopstetter, Carol Hopstetter, Rena Beyler, Roger Lance, Patricia Lance, Richard Rinehart, Deborah Rinehart, Jeffrey W. Nelson, Robert Hart, Marita Hart, Bill Greene, JoAnne Greene, Michael Boldman, Peggy Boldman, John Etling, Anna Mae Etling, Paul Wayts, Vermillah Wayts, Marie Winkler, POA James Winkler, Winkler Tire, Jim Winkler, Dollie Winkler, Patricia Shue, Walter Hostetler, Lucille Hostetler, John Bowman, Deb Bowman, Mary Slbaugh, Joe Slabaugh, Dan Asche, Robert Schorle, Linda Schorle, Annabelle Fisher, Marguerite Johnson, Mary M. Schorle, John Rastorfer, Ruth Rastorfer, Ronald V. Fecca, Jennifer Emch, James Hunt, Victoria Hunt, Melvin Schaffter, Gloria Shaffter, David Montgomery, Cynthia Montgomery, Dick Glessner, Keith Glanco, Diana Glanco, Carl Steiner, Carol Steiner, Steiner Farm, Herman Winkler, Lucille Winkler, Caulinbine Yost, Stephen M. Reber, Paul Glessner, Maxine Glessner, Lloyd Wiles, Alice Wiles, John Bischoff, James Bischoff, Barbara Bischoff, Olga Landis, Ralph Griffith, Louise Griffith, Bill Watts, Mary Watts, R.D. Trogdon, Shirley Trogdon, Josephine Reynolds, Rebecca Reynolds, Kaye Maibach, Edward Maibach, Arlene Maibach, Everett Pertee, Helen Lucille Pertee, Woodrow Fankhauser, Betty Fankhauser, David Pilkington, Sharon Pilkington, Donald Glessner, Ruth Glessner, Kathleen Buckingham, Frederick Sheppard, JoEtta Sheppard, Milton Township, Paul Kawczk, Charlotte Kawczk, Charles Beyner, Melzena Beyner, William Cunningham, Anna Mae Cunningham, Alvin Maibach, Lynne Maibach, Thelma Drayer, and Kathy Cook. Winkler

Tire is a sole proprietorship and Milton Township is a governmental subdivision in Ohio.

Respondent is the Village of Rittman, a municipal corporation in northern Ohio.

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PETITION FOR A WRIT OF CERTIORARI

Harry McNamara, et al. ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 473 F.3d 633 (6th Cir. 2006). The opinion of the district court, App. 15a, is unpublished.

JURISDICTION

The court of appeals issued its decision on January 8, 2007; Justice Stevens extended the time to file this petition to and including May 9, 2007. App. 13a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment's Due Process and Takings Clauses provide: "No person shall...be deprived of...property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. They are applicable to the States through the Fourteenth Amendment, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

A. Rittman Takes Petitioners' Groundwater

Thirteen (13) years in litigation and Petitioners have yet to have a decision on the merits of their claims.

Petitioners are individual homeowners that own and reside in their respective homes in close proximity to each other in Wayne County, Ohio. Many of the petitioners had lived in their homes for more than 20 years prior to the events herein. Each of the petitioners supplied their home or family farm with water for all domestic uses from their individual water well. There are no sources of public water close to most petitioners so without water from their respective wells, homes and family farms would be abandoned without a source of water.

In the late 1970's, Rittman showed interest in acquiring land, miles outside its boundaries, to construct a new municipal well field. The Ohio Department of Natural Resources responded to citizen's concerns about this new well field by conducting an investigation and issuing a report that states, in part:

> Concerned about potential impacts to existing private water wells in the vicinity of the Village of Sterling, the Milton Township Trustees conducted a meeting in Sterling in June 1976. Representatives of the ODNR-Division of Water-Ground Water Resources Section (GWRS) attended this meeting and stated that pumping the well field would lower water levels in the area. They also advised the City of Rittman to attempt to minimize the effects of pumping the well field on the surrounding private wells.

(See Appendix at p. 32a).

Despite the report by the Ohio Department of Natural Resources, Rittman installed a well field consisting of three wells and began to pump 500,000 to 750,000 gallons per day. Petitioners began experiencing problems with their wells going dry thereafter and have spent thousands of dollars, per family, restoring water to their property. In a number of instances their water now is of a poorer quality and a lesser quantity than what existed prior to Rittman's well field. Petitioners conserved water because they were afraid of running out of water and, therefore, restricted the use of their property. Problems with personal hygiene as a result of a lack of water were common. Petitioners did not have the ability to sell their property. A house without a source of water cannot be sold at its fair market value, and is worth less than that same house with a source of water.

The pumping of groundwater by Rittman has continued unabated from its inception to the present thereby continuing to take petitioners' property rights in ground water and inflict damages upon petitioners.

B. Petitioners' State Actions Seeking Compensation

In 1994, a lawsuit was filed in the Wayne County Common Pleas Court alleging that this Defendant, had caused Plaintiffs unreasonable harm under the decision of *Cline v. American Aggregates* 15 Ohio St, 3d 384, 474 N. E. 2d 324 (1984). This unreasonable harm was as a result of Rittman's pumping lowering the groundwater thereby drying up petitioners' water wells. There was no inverse condemnation claim filed because at that time, Ohio had no such procedure. *Coles v. Granville*, 448 F. 3d 853 (6th Cir. 2006). Petitioners brought this damages action to be compensated for their injuries to satisfy the Supreme Court's and Sixth Circuit's requirement that plaintiffs seek and be denied compensation before bringing a Fifth Amendment Takings claim to federal court. *Williamson* and *Silver v. Franklin Township, Board of Zoning Appeal*, 966 F. 2d 1031, 1034-1035 (6th Cir. 1991). The trial court granted summary judgment to Rittman on the basis of governmental immunity under the Ohio Revised Code. The

court of appeals affirmed the trial court, holding that Rittman was immune from liability . *McNamara v. Rittman*, 125 Ohio App. 3d 33, 707 N.E. 2d 967 (1998). The Ohio Supreme Court accepted a discretionary appeal, *McNamara v. Rittman*, 82 Ohio St. 3d 1414, 694 N.E. 2d 76 (1998) and the case was briefed and argued but was subsequently dismissed, as improvidently granted. *McNamara v. Rittman*, 85 Ohio St.3d 1206, 707 N.E. 2d 943 (1999).

C. District Court Dismisses Federal Claims

Petitioners filed their complaint in U.S. District Court complaint, pursuant to 42 U.S.C. § 1983, in 2000, seeking compensation under the Fifth Amendment Takings Clause. They also asserted a claim for the violation of their procedural due process rights. Rittman moved for summary judgment arguing that: 1. there was no taking; 2. the claims were barred by the statute of limitations; 3. *res judicata* and collateral estoppel barred plaintiffs' claims and 4. the federal courts should abstain from exercising jurisdiction. The trial court issued its decision holding that plaintiffs had a constitutionally protected property interest but that their claims were barred by the statute of limitations.

D. Court of Appeals Affirms

The Court of Appeals, after oral arguments, certified the following question to the Ohio Supreme Court:

> Does an Ohio homeowner have a property interest in so much of the groundwater located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?

The Ohio Supreme Court agreed to answer the question, pursuant to Rule XVIII of the Rules of Practice of the Ohio Supreme Court, since it "may be determinative of the proceeding." The Ohio Supreme Court answered the question affirmatively and held that "Ohio landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can

constitute an unconstitutional taking." *McNamara v. Rittman*, 107 Ohio St. 3d 243, 838 N.E. 2d 640 (2005).

Petitioners argued that *Williamson* required them to seek compensation through state procedures in order to ripen their federal claims. In Ohio, at that time, the only state procedure was to seek compensation through a state common law tort claim under *Cline v. American Aggregates,* supra. There were no other state common law claims, such as trespass or nuisance, that would have established liability and there was no statutory claim available. Petitioners used that state procedure and when the Ohio Supreme Court rejected compensation, *McNamara v. Rittman*, 85 Ohio St.3d 1206, 707 N.E. 2d 943 (1999), petitioners had timely filed their federal takings claim. The Court of Appeals held that petitioners' claim for taking of their property interest in groundwater was ripe at the latest in 1994. The court reasoned that because Ohio had no inverse condemnation procedure when petitioners filed their state suit, there were no "reasonable, certain and adequate procedures" for obtaining compensation for a takings claim. Thus, Petitioners could have brought their suit directly to federal court. The Court of Appeals did not expressly rule on petitioners' argument that they were required to seek compensation through a state common law tort remedy but implicitly overruled it by holding that petitioners' claims were immediately ripe in 1994 without resort to Ohio compensation procedures. According to the court of appeals below, petitioners' claims were immediately ripe in 1994, which is when their claim accrued. Thus, their complaint was barred by the statute of limitations.

Petitioners also argued that since Rittman's pumping was ongoing and had continued from its inception to the present, that there was a continuing taking of their property rights. As to this claim, the Court of Appeals held that now, in 2006, Ohio did have a reasonable and certain procedure to obtain compensation, these claims were not ripe under *Williamson* and petitioners must return to state court to obtain compensation. Therefore, the court below

invoked *Williamson* to hold that some of petitioners' claims were ripe in 1994 and therefore outside the statute of limitations and to hold that the remainder of petitioners' claims were not yet ripe and must return to state court.

REASONS FOR GRANTING THE WRIT

I. WILLIAMSON'S STATE-LITIGATION RULE HAS CREATED CONFLICTS AND CONFUSION AND SHOULD BE RECONSIDERED.

A. The Generality of the State-Litigation Rule.

Williamson set forth two rules on ripening Fifth Amendment Takings claims. The first rule was to assure that government had reached a final decision. Herein there is a physical taking so the consideration underlying that rule is not present. *Forseth v. Village of Sussex*, 199 F. 3d 363, fn. 12 (7th Cir. 2000), *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza*, 479 F.3d 63 (1st Cir. 2007).

The second rule on ripeness is at issue, " [I]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yields[s] just compensation,' then the property owner 'has no claim against * * * the Government' for a taking." Id. at 194. This second rule on ripeness has been termed "the state litigation rule", *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), (concurring op. Ch. Justice Rehnquist, p. 349).

What is lacking in this rule is some definition. Does the phrase "adequate process for obtaining compensation" in state court require the filing of : a state takings claim; an inverse condemnation claim; a state common law tort claim; a Federal takings claim; or all of these in state court? This lack of definition allowed the Sixth Circuit to avoid the merits of petitioners' claims. Petitioners filed a state common law tort claim seeking compensation for their damages to comply with the state litigation rule of *Williamson*. Had petitioners been successful in reaching

the merits of their state common law tort claim, they would have been awarded compensation for their injury in the form of damages, which would have satisfied the Fifth Amendment. *Cline v. American Aggregates*, 64 Ohio App. 3rd 503, 582 N.E. 2d 1 (Ohio App. 1989). However the Court of Appeals below ignored petitioners' state common law tort claim and instead held that petitioners' takings claims were immediately ripe under *Williamson*, without resort to state compensation procedures, and therefore the statute of limitations ran on petitioners' takings claim while petitioners were seeking compensation through their state common law tort.

The lack of definition with the resulting inconsistencies in how this state litigation rule is applied should lead this Court to reexamine *Williamson*.

B. The Procedure That a Plaintiff Must Follow to Ripen a Federal Takings Claim Under *Williamson* Varies Among the Circuits.

Regardless of whether a state procedure for obtaining compensation for a takings has ever been judicially recognized, that procedure must be undertaken to comply with *Williamson* in a number of the circuits. However there is a distinction among those circuits that require pursuit of an inverse condemnation claim but not a state law takings claim. Some circuits require pursuit of a state common law tort remedy to satisfy *Williamson* but other circuits are not clear that this is a requirement. In two circuits, state court can be avoided under diversity jurisdiction by filing the state procedure in federal court. This maze has prompted courts to hold that the state litigation rule "has created a Catch-22 for takings plaintiffs." *Santini v. Connecticut Hazardous Waste Management Serv.*, 342 F. 3d 118, 127 (2nd Cir. 2003) and "has drawn substantial criticism" *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza*, supra at 80.

The First Circuit has held that compliance with the state litigation rule does "not include litigation of a state [law] takings claim or general remedial cause of action under State law", but only includes those procedures specifically designed to avoid constitutional injury. *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza*, supra at (1st Cir. 2007).

The Second Circuit requires resort to state law takings claims, even if there has never been recognition of those claims, to satisfy the state litigation rule. *Southview Associates v. Bongartz*, 980 F.2d 84 (2nd Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Villager Pond v. Darien*, 56 F.3d 375 (2nd Cir. 1995), *cert. denied*, 519 U.S. 808 (1996). (Remedy potentially available).

The Fourth Circuit allows the state litigation rule to be avoided completely by pleading a physical taking as a Fourth Amendment seizure. *Presley v. City of Charlottesville*, 464 F.3d 480 (2006).

The Fifth Circuit has held that resort to all state procedures, even a state nuisance claim, in state court is required to satisfy the state litigation rule. *Samaad v. City of Dallas*, 940 F. 2d 925 (5th Cir. 1991). But a state taking claim can initially be brought in federal court if there is diversity jurisdiction. *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382 (5th Cir. 2001).

The Seventh Circuit has held that resort to state procedures is required and is not futile even when the settled common law makes the result unlikely to be favorable. *Rockstead v. City of Crystal Lake*, 2006 U.S. App. LEXIS 32553 (7th Cir. 2006).

The Eighth Circuit generally requires pursuit of state procedures for compensation to satisfy the state litigation rule. *McKenzie v. City of Whitehall*, 112 F.3d 313 (8th Cir. 1997).

The Ninth Circuit has held that only state law remedies need be sought to satisfy the state litigation rule,

but any Fifth Amendment taking does not have to put forth in state court. *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), *later proceedings* 136 F. 3d 1219, *cert. denied* 525 U.S. 923 (1996).

The Tenth Circuit has held that failure to utilize a state's inverse condemnation procedure prevents a Federal takings claim from ripening. *S.K. Finance v. Ca Plata County*, 126 F.3d 1272 (10th Cir. 1997). However, the Court specifically held that under diversity jurisdiction a district court had jurisdiction to determine a state law inverse condemnation claim. *Id.*, at 1276.

In *Franco v. District of Columbia*, 456 F. Supp. 2d 35 (D.C. 2006), the Court held that in order for a takings claimant to ripen his claim under the state litigation rule, he would have to file in state court for contractual remedies that may be available to provide compensation.

C. *Williamson* Must be Reconsidered.

The decision below shows the problems with the generality of the state-litigation rule of *Williamson*. "It may seem perverse that one takings claim (past violations) be barred by statute of limitations because it was delinquently filed in federal court, and yet a similar claim (continuing violations) be barred because it was prematurely filed in federal court. But this is the nature of the federal-state interplay after *Williamson****". *McNamara v. Rittman*, supra, at p. 640. If petitioners were not required to comply with the state litigation rule of *Williamson*, then this bit of perversity would cease to exist and not trap litigants in its maze of complexity and uncertainty. Petitioners could file directly in federal court and have their Fifth Amendment rights adjudicated by the federal judiciary.

If petitioners were located in the First Circuit, then since there is no procedure to specifically avoid a constitutional injury in Ohio, *Coles v. Granville*, supra, they could go directly to district court to have their continuing violations claim heard. In the Second Circuit, petitioners would have to litigate all claims, such as state

tort claims seeking damages, to satisfy the state litigation rule. In the Fourth Circuit, petitioners could plead their claims as seizures of property under the Fourth Amendment thereby avoiding the state litigation rule completely and come directly to district court. In the Fifth Circuit, petitioners would be required to file all claims, including state law claims seeking damages, in state court to comply with the state litigation rule unless jurisdiction is based on diversity then petitioners could avoid state court and bring their state law claims in district court. In the Sixth Circuit, under the holding herein, petitioners were required to file in state court for a writ of mandamus ordering the government to institute an inverse condemnation claim, but would not be required to file a claim for damages under state tort law to satisfy the state litigation rule. In the Seventh Circuit, petitioners would be required to litigate all of their claims in state court to satisfy the state litigation rule. In the Ninth Circuit, petitioners would be required to litigate all state law remedies to ripen their claims under the state-litigation rule. In the Tenth Circuit, petitioners would have to invoke an inverse condemnation procedure in state court to satisfy the state court litigation rule unless jurisdiction were based on diversity, then state inverse condemnation procedure could be brought directly to district court thereby bypassing state court.

The result petitioners received in this case is dependent on where they lived. These inconsistencies in what is required to satisfy the state-litigation rule should lead this Court to re-examine *Williamson*.

II. THE STATUTE OF LIMITATIONS ON A TAKINGS CLAIM DOES NOT BEGIN TO RUN UNTIL THE CLAIM IS RIPE UNDER *WILLIAMSON*.

A. *Williamson* Presents Claimants with a Statute of Limitations Dilemma.

Williamson ripening rules presents claimants with resulting uncertainties concerning when the statute of limitations begins to run. A party has to guess as to what remedies need be pursued through state procedures before a federal takings claim is ripe. These uncertainties are worsened by the split in the circuits as to what is required to satisfy the state litigation rule. If a party files in district court and the claim is not ripe then one must return to state court and hope that the statute of limitations has not expired on any state procedure. If the statute of limitations has expired on the state procedures, then the federal takings claim can never ripen. *Liberty Mutual Ins. Co v. Brown*, 380 F. 3d 793, 799 (5th Cir. 2004), *Pascoag Reservoir & Dam LLC v. Rhode Island*, 337 F. 3d 87, 94 (1st Cir. 2003) If a party files in state court when the claim is already ripe under *Williamson*, then the statute of limitations can expire on the federal takings claim while the claimant is pursuing remedies in state court, as shown by the decision petitioners received in the court of appeals.

B. A Takings Claim Accrues Only After the *Williamson* Requirements Are Satisfied.

Accrual of a claim under 42 U.S.C. 1983 for purposes of commencing the statute of limitations occurs when "'the plaintiff has a complete and present cause of action *** that is, when the plaintiff can file suit and obtain relief.'" *Wallace v. Kato*, 127 S. Ct. 1091, 166 L. Ed 2d 973 *(2007)*, (quoting from *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). *Williamson's* language and its resulting effect is that until its rules for ripening are met a plaintiff cannot file suit nor obtain relief on his Federal takings claim. Therefore a takings claim brought pursuant to §1983 does not accrue for purposes of commencing the statute of limitations, until the plaintiff satisfies the *Williamson* requirements. A majority of the circuits agree.

For example, in a takings case concerning statutory rent control ordinances, the Ninth Circuit addressed this exact point. The Court held that "a plaintiff cannot bring a

section 1983 action in federal court until the state court denies just compensation. A claim under section 1983 is not ripe- and a cause of action under section 1983 does not accrue – until that point." *Levald v. City of Palm Desert*, 998 F. 2d 680, 687 (9th Cir. 1993). Similarly, Judge, now Justice, Kennedy made this point when he wrote "In suits for wrongful deprivation of property under 42 U.S.C. § 1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes ..." *Norco Construction v. King County*, 801 F. 2d 1143, 1146 (9th Cir. 1986). The Seventh Circuit and Eleventh Circuit agreed with the reasoning of *Norco*. *Biddison v. City of Chicago*, 921 F. 2d 724 (7th Cir. 1991) (holding "His federal claim will ripen, and the statute of limitations will begin to run, if and when Biddison is denied just compensation by the state courts." *Id.*, at 729); and *Corn v. City of Lauderdale Lakes*, 904 F. 2d 585 (11th Cir. 1990) (explaining that the accrual of a section 1983 claim for a takings does not occur until it is ripe. *Id.* at 588).

Williamson provides "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against *** the Government for a taking. *Id*, at 194. Chief Justice Rehnquist, in his concurrence in *San Remo*, stated "It is not obvious that either constitutional or prudential principles require claimants to utilize **all** state compensation procedures before they can bring a federal takings claim." (emphasis added). The state procedures that must be resorted to are not limited to inverse condemnation but can include those that will provide compensation. A state common law tort remedy is such a procedure.

Physical takings, as opposed to regulatory takings, consist of conduct that is likely to give rise to a state common law tort remedy, such as trespass, waste, nuisance, or a variation of one of these such as the dewatering claim of petitioners under *Cline v. American Aggregates*, supra. This difference between physical and regulatory takings affects the interpretation of the state-litigation rule. In

regulatory takings, compensation procedures through state law would typically include state takings claims brought under state constitutions, and inverse condemnation claims seeking to enforce either state or federal constitutional rights. In physical takings, compensation procedures through state law would typically include those mentioned for regulatory takings but would also include a state common law tort remedy. *Williamson* demands that compensation be sought through state procedures before turning to district court. One of those procedures, for a physical taking, would be a state common law tort remedy.

A state common law tort remedy was sufficient to provide procedural due process when there was an allegation of destruction of personal property. *Hudson v. Palmer*, 468 U.S. 517 (1984). There, the inquiry was whether "several common law remedies available to respondent would provide adequate compensation for his property loss." *Id.* at 534-535. Since state common law tort remedies can provide constitutionally adequate compensation for a property loss under the Fourteenth Amendment, those same considerations mandate that those same tort remedies can provide compensation for a taking of property without just compensation under the Fifth Amendment.

Petitioners went to state court to seek compensation for their takings claim to meet the requirements of *Williamson*. Had they been successful in state court then they would have received damages for the taking of their property and no resort to federal court would have been necessary. This is the teaching of *Williamson*.

C. The Court of Appeals Decision Creates a Split in the Circuits that Requires This Court to Review.

The Court of Appeals below held petitioners' claims for takings accrued for purposes of commencing the statute of limitations when they knew about their injury. *McNamara v. Rittman*, supra at 637. This holding is contrary to the holdings of the Seventh, Ninth and Eleventh

Circuits, supra that the claim accrues and the statute of limitations begins to run when the ripeness requirements of *Williamson* are met. In this case that would have been in 1999 when the Ohio Supreme Court dismissed petitioners appeal as improvidently granted. Petitioners filed their complaint in district court in 2000, which was within the statue of limitations. *LRL Properties v. Portage Metro Housing Auth.*, 55 F. 3d 1097, 1105 (6th Cir. 1995, reh. en banc denied 1995 U.S. App. LEXIS 16558 (1995).

The Court of Appeals decision that petitioners claims were ripe and accrued in 1994 when they knew of their injury without regard to the effort to ripen their claim in state court not only creates a split in the circuits but disregards the teachings of *Williamson.* It has also ensnared petitioners in one of *Williamson's* traps. While petitioners were pursuing their state law procedures to ripen their claims under the state-litigation rule, the statute of limitations had already begun to run on the federal takings claim. Clearly an unjust and inequitable paradox.

CONCLUSION

Enforcing a person's constitutional rights should not require navigating through a maze of rules trying to divine the correct route with insufficient guidance. The state litigation rule of *Williamson* has proved unworkable because of differing interpretations given to it by the various circuits with the result being that a claimant's takings rights are determined by where they reside and not by the Constitution. This rule should be re-examined.

If *Williamson* continues then claimants should not be caught in the trap proceeding to state court to ripen their federal takings claim but having the statute of limitations expire on their federal claim while they are proceeding in state court. Conversely, if claimants go to federal court, believing that their claims are ripe under *Williamson*, and receive a decision that they must return to state court then be faced with the statute of limitations having run on their

state remedies and never be able to ripen their federal claims.

Respectfully Submitted,

Steve J. Edwards
(Counsel of Record)
4030 Broadway
Grove City, Ohio 43123
(614) 875-6661

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0004p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-3965

HARRY McNAMARA, et al.,
Plaintiffs-Appellants,

v.

THE CITY OF RITTMAN,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 00-03046 – Kathleen McDonald O'Malley,
District Judge.

Argued: December 4, 2003

Decided and Filed: January 8, 2007

Before: KENNEDY, MARTIN, and MOORE,
Circuit Judges.

COUNSEL

ARGUED: Steve J. Edwards, Grove City, Ohio, for Appellants. Melvin L. Lute, Jr., BAKER, DUBLIKAR, BECK, WILEY & MATHEWS, North Canton, Ohio, for Appellee. **ON BRIEF:** Steve J. Edwards, Grove City, Ohio, for Appellants, Melvin L. Lute, Jr., Jack R. Baker, BAKER, DUBLIKAR, BECK, WILEY & MATHEWS, North Canton, Ohio, for Appellee.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. This case involves a federal takings claim arising from the City of Rittman's operation of water wells that allegedly caused damage to plaintiffs. In our initial review of the district court's judgment, we requested that the Supreme Court of Ohio answer an important question of first impression involving aproperty owner's interest in the groundwater beneath his property. The Supreme Court of Ohio has now answered that question. For the reasons articulated below, we **AFFIRM** the decision of the district court.

I

In 1973, the City of Rittman, Ohio, purchased a tract of land near the City of Sterling for the purpose of drilling three wells there to serve the City of Rittman's water needs. By 1980, the City of Rittman had completed this project and began operating the wells, which now supply it with between 500,000 and 750,000 gallons of water per day.

A. State Court Proceedings

On January 4, 1994, the plaintiffs, all of whom are residents of the City of Sterling, filed a complaint in

state court seeking damages and injunctive relief against the City of Rittman. The plaintiffs alleged that the City of Rittman's use of the three new wells lowered their aquifer, causing them to suffer water shortages and adversely affecting the quality of their water. Additionally, the plaintiffs alleged that the City of Rittman's actions forced them to drill new wells and purchase new water pumps and water-softening equipment. The plaintiffs argued that the City of Rittman's activities constituted an "unreasonable dewatering" pursuant to the cause of action recognized by the Supreme Court of Ohio in *Cline v. American Aggregates Corporation*, 474 N.E.2d 324 (Ohio 1984). The state trial court granted summary judgment to the City of Rittman based on sovereign immunity and statute of limitations grounds. The court of appeals affirmed under similar reasoning, noting that the *Cline* rules are only of immediate concern in dewatering actions brought against *private* defendants. *McNamara v. City of Rittman*, 707 N.E.2d 967, 972 (Ohio Ct. App. 1998). Where the defendant is a political subdivision of the state, however, the sovereign immunity inquiry necessarily precedes any analysis under *Cline*. *Id.* Here, the state court of appeals affirmed that sovereign immunity bars the plaintiffs' prayers for relief, whether for damages or an injunction. *Id.* The Supreme Court of Ohio dismissed the plaintiffs' appeal as improvidently granted. *McNamara v. City of Rittman*, 707 N.E.2d 943 (Ohio 1999).

B. Federal Court Proceedings

On December 7, 2000, the plaintiffs filed a federal complaint seeking relief under 42 U.S.C. §1983, alleging that the City of Rittman's actions constituted (1) a taking of their property without just compensation in

violation of the Fifth Amendment, and (2) a violation of their right to procedural due process under the Fifth and Fourteenth Amendments. The district court concluded that the plaintiffs' takings claim was timed-barred by the statute of limitations:

> [N]either *Williamson County* [*Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)] nor any subsequent takings case law holds that a plaintiff must pursue *all conceivable means* of remedy before a federal takings claim is ripe . . . . *Williamson County* requires only that a plaintiff attempt to obtain just compensation for a taking through procedures designated for that purpose. *Williamson County*, 473 U.S. at 194-95. Where that procedure is deemed inadequate, as it has been in Ohio, *see Kruse* [*v. Village of Chagrin Falls*,] 74 F.3d at 698, then a takings claim is ripe immediately . . . . Accordingly, the Court finds that Plaintiffs' takings claim ripened immediately when Plaintiffs knew or should have known of the underlying injury. Plaintiffs must have acquired this knowledge no later than when Plaintiffs filed their state court Complaint. *See Conlin v. Blanchard*, 890 F.2d 811, 815 (6th Cir. 1989). Because the statute of limitations on §1983 claims in Ohio is two years, and because Plaintiffs did not file their takings claim in federal court until six years after they filed their state Complaint, their takings claim is barred by the statute of limitations.

D. Ct. Op., Aug. 8, 2002, at 10-11 (emphasis in original). As for the plaintiffs' due process claim, the district court ruled that it was similarly time-barred, because "Plaintiffs' procedural due process claim, like their takings claim, ripened immediately when Plaintiffs knew or should have known of the underlying injury." *Id.* at 15.

This panel heard the appeal of the district court judgment on December 4, 2003. We determined that the takings issue could not be resolved without first understanding whether an "unreasonable dewatering" action under *Cline* implicates property rights. Thus, we filed an order certifying the following question to the Supreme Court of Ohio: "Does an Ohio homeowner have a *property* interest in so much of the groundwater located beneath the land owner's property as is necessary to use and enjoyment of the owner's home?" On December 21, 2005, the Supreme Court of Ohio answered this question in the affirmative, holding that "Ohio landowners have a property interest in the groundwater underlying their land," and thus "governmental interference with that right can constitute an unconstitutional taking." *McNamara v. City of Rittman*, 838 N.E.2d 640, 646 (Ohio 2005). Having received this answer, we are confident that our Circuit's takings jurisprudence – in particular, that portion pertaining to takings under Ohio law – applies full force to this appeal.

II

This Court reviews *de novo* a district court's holding that a legal claim is barred by the applicable statute of limitations period. *See Banks v. City of Whitehall*, 344 F.3d 550, 553 (6th Cir. 2003). "The statute of limitations for federal civil rights claims is the appropriate state statute of limitations." *Lawson v. Shelby County*, 211 F.3d 331, 336 (6th Cir. 2000) (citing *Wilson v. Garcia*, 471 U.S. 261). In this case, the parties agreed that the applicable statute of limitations is two years. *See* Ohio Rev. Code §2305.10.[1] Based on this statute

[1] In 2004, the Ohio legislature added a time-limitation provision in actions "[f]or relief on the grounds of a physical or

[footnote continued]

of limitations, the district court dismissed the action because the federal §1983 action was filed six years after the filing of the claim in state court. The district court found that plaintiffs knew of their injury, at the very latest, at the time of filing the state court action in 1994, thus making the action four years late.

While we agree with the district court's ultimate resolution of the matter, it is important to clarify some of the nuances of this case not addressed in its opinion. In particular, we have separated our analysis into two parts: (1) "past violations" – based on the premise that the constitutional violation committed by the City, if any was committed at all, has already occurred; and (2) "continuing violations" – based on the notion that a new constitutional violation, if any exists, continues to be committed by the City, and inflicted on the plaintiffs, each day. *See Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997).

A. Past Violations

In its December 2000 complaint before the district court, the plaintiffs' primary allegation was that the City's dewatering of their wells represented an unconstitutional taking of their property, and that they should be entitled to damages – compensation in the form of $25,000 per individual plaintiff – for this taking. A threshold question in any federal takings action, how-

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regulatory taking of real property." Ohio Rev. Code §2305.-09(E). This new limitations period is four years, not two. Thus, any takings actions brought after 2004 should follow the four-year time bar, and this could be relevant to any continuing violations actions plaintiffs may wish to bring in the future, as discussed in Part II-B of this opinion. However, as to the original action brought by the plaintiffs and dismissed by the state and district courts on statute of limitations grounds, the two-year limit properly applies.

ever, is whether or not the case is ripe for review; for if it is not ripe, then we lack jurisdiction to hear the case. *Williamson,* 473 U.S. at 194-95. In *Williamson,* the Supreme Court ruled that constitutional takings claims are not ripe for federal court review until state compensation procedures, assuming they exist and are adequate, have been exhausted:

> The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). There, the Court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer,* 468 U.S. 517, 532 n. 12, 104 S.Ct. 3194, 3203, n. 12, 82 L.Ed.2d 393 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Id. at 195.

The critical inquiry after *Williamson*, therefore, is whether or not the state compensation procedures are "reasonable, certain, and adequate." *Id.* at 194. This inquiry is necessarily time-specific, because a state may have inadequate compensation procedures at one point in time, but these may at a later date be rectified by statute (via the state legislature) or through evolution of the common law (via state courts). *See Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002) (stating that "*Williamson* specifically instructs that the relevant time frame for determining the adequacy of state provisions for obtaining just compensation for an alleged taking is 'at the time of the taking' "). This is exactly what happened in the 1990s in Ohio.

Ohio currently has a "reasonable, certain, and adequate procedure" available to takings claimants in state courts:

> Ohio does not have an inverse condemnation or other direct, statutory cause of action for plaintiffs seeking just compensation for a taking. Rather, Ohio law provides a statutory mechanism by which the government actor seeking to take property is under a duty to bring an appropriation proceeding against the landowner. *See* Ohio Rev. Code § § 163.-01-163.62; *Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59, 765 N.E.2d 345, 350 (2002). A property owner who believes that his property has been taken in the absence of such an appropriation proceeding may initiate a mandamus action in Ohio court to force the government actor into the correct appropriation proceeding. . . . Over the last ten years Ohio courts, including the Ohio Supreme Court, have consistently recognized mandamus as the vehicle with which to contest an involuntary taking, no matter whether that taking is a regulatory

> or a physical one, and no matter whether the public actor is a state or local entity.

Coles v. Granville, 448 F.3d 853, 861, 865 (6th Cir. 2006). However, it was not until 1994 that the availability of such a mandamus action was made explicit by the Supreme Court of Ohio. *See Levin v. City of Sheffield Lake*, 637 N.E.2d 319, 323-34 (Ohio 1994); *see also Coles*, 448 F.3d at 864 (noting that in Ohio, the *Levin* decision was the "genesis of the modern recognition of the mandamus action to force appropriation proceedings"). Thus, prior to the *Levin* decision, Ohio's compensation procedures in takings cases were decidedly *not* adequate. *Williamson* therefore had little impact on takings claims brought in Ohio prior to *Levin*, as such claims were immediately ripe for federal review.

The plaintiffs in the instant case filed their original state-court complaint on January 4, 1994, roughly six months prior to the issuance of *Levin*. The date on which the plaintiffs filed their state-court complaint is, logically, the latest time at which they could have first known of their injury. Because there was no "reasonable, certain, and adequate procedure" available to takings claimants in Ohio state courts prior to the *Levin* decision, and because the alleged deprivation here occurred prior to *Levin*, the plaintiffs' claim was ripe for federal review already in 1994. And because it was ripe for review in 1994, it was consequently time-barred when the plaintiffs filed in federal court in 2000, well past the then two-year statute of limitations for §1983 takings actions.

The plaintiffs' procedural due process claims pertaining to past violations by the City are similarly time-barred. "Procedural due process and equal protection

claims that are ancillary to taking claims are subject to the same *Williamson* ripeness requirements . . . ." *Arnett*, 281 F.3d at 562; *see also Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 159-60 (6th Cir. 1992). This requires the plaintiffs to show that they had pursued an adequate state measure for obtaining just compensation before their due process claim would be ripe. Because no adequate measure existed at the time, however, the due process claim was ripe concurrent with the takings claim, and as such it too is barred.[2]

B. Continuing Violations

The district court did not consider whether this case might implicate the "continuing violation" doctrine for purposes of the statute of limitations. "Ordinarily, the limitations period starts to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) (internal quotation marks and citations omitted). The limitations period will not bar all actions for all time, however, as in certain cases where there is a "continuing violation . . . which inflict[s] continuing and accumulating harm . . . ." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15. (1968) (discussing the government's continuing violation of a company's rights under the Sherman Act). In other words, "[a] law that works an

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[2] Although the district court came to the same ultimate result as we do now, it was incorrect for the court to have conducted a *separate* ripeness analysis for the due process claim. *See* D. Ct. Op., Aug. 8, 2002, at 12-14. Rather, because the procedural due process claim in this case is not independent of the underlying takings claim, ripeness analysis for the takings claims necessarily subsumes ripeness analysis for the due process claim.

ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment." *Kuhnle*, 103 F.3d at 522.

The primary reason why the district court failed to consider the continuing violation issue is because it was not properly raised before that court. Although we have discretion to rule on an issue of law even in the absence of its proper development below, *see Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988), we decline to exercise such discretion here. If we were to do so, we would be ruling on a takings claim not brought before the state courts in 1994, nor before the district court in 2000, but before *this* Court in 2006.[3] And such a claim, brought for the first time in 2006, would not be ripe for our review. *See Coles*, 448 F.3d at 865. Because "[t]oday, Ohio has 'reasonable, certain, and adequate procedures' for plaintiffs to pursue compensation for an involuntary taking," and because "there is no dispute that Plaintiffs have failed to request mandamus from the state," plaintiffs' continuing-violation takings claim is not yet ripe for review. *Id.* The proper course is for plaintiffs first to file a mandamus action in state court based on their continuing-violations theory.

It may seem a bit perverse that one takings claim (past violations) be barred by statute of limitations because it was delinquently filed in federal court, and yet a similar claim (continuing violations) be barred by ripeness because it was prematurely filed in federal court. But this is the nature of federal-state interplay

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[3]The issue of continuing violations was first properly raised in the parties' letter briefs submitted to this Court in March 2006.

after *Williamson*, a dance made more awkward when actions, as here, both pre- and post-date the Ohio Supreme Court's decision in *Levin*. This Court's decision in *Coles*, however, has significantly clarified how such cases should be handled in the future. *See also* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 292-300 (2006) (discussing "Takings Federalism" in the context of the *Williamson* ripeness requirement, and noting that if federal courts "were free to hear takings claims in the first instance, their determinations would not have the benefit of any comparable record with respect to state law").

For identical reasons, we decline to consider the plaintiffs' continuing-violation due process claim, which is ancillary to the continuing-violation takings claim. *See Bigelow*, 970 F.2d 154, 160 ("Until the state courts have ruled on the plaintiffs' inverse condemnation claim, this court cannot determine whether a taking has occurred, and thus cannot address the procedural due process claim with a full understanding of the relevant facts.").

III

Based on the discussion above, we **AFFIRM** the district court's grant of summary judgment in favor of the City of Rittman.

APPENDIX B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 10, 2007

Mr. Steve J. Edwards
4030 Broadway
Grove City, OH 43132

Re: Harry McNamara, et al.
v. City of Rittman, Ohio
Application No. 06A965

Dear Mr. Edwards:

The application for the extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on April 10, 2007 extended the time to and including May 9, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

/s/ RJ
Ruth Jones
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Steve J. Edwards
4030 Broadway
Grove City, OH 43132

Clerk
United States Court of Appeals for the Sixth Circuit
524 Potter Stewart Courthouse
100 East Fifth Street
Cincinnati, OH 45202

APPENDIX C

[Filed Aug. 8, 2002]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:00-CV-3046
JUDGE O'MALLEY

HARRY McNAMARA, et al.

Plaintiffs,

v.

CITY OF RITTMAN,

Defendant.

MEMORANDUM & ORDER

Plaintiffs are homeowners in and around the Village of Sterling in Wayne County, Ohio, who use private wells to obtain water for domestic use. They allege that the nearby City of Rittman (City) began pumping vast amounts of groundwater from wells drilled near Plaintiffs' homes, which lowered the aquifer and adversely affected the quality and quantity of water available to Plaintiffs. Plaintiffs assert that the City's action violated their due process rights and effected a taking without just compensation. Defendant moves for summary judgment

on each claim. The Court finds well taken Defendant's argument that Plaintiffs' claims are barred by the statute of limitations. For this reason, as explained below, Defendant's motion is **GRANTED** and this case is **DISMISSED.**

I. BACKGROUND.

The parties' groundwater dispute was first presented to the Ohio Court of Appeals, which briefly outlined the underlying facts:

> In 1973, the City of Rittman ("City") purchased a parcel of property near the City of Sterling. Preliminary studies were conducted and plans were approved for the drilling of three wells on the parcel. The wells were completed and placed into operation by 1980. Approximately five hundred thousand to seven hundred fifty thousand gallons of water a day are pumped from this wellfield to serve the needs of the City's residents.

McNamara v. City of Rittman, 707 N.E.2d 967, 969 (Ohio Ct. App. 1998). Before operation of the wellfield began, the City of Rittman held a number of meetings to inform residents of the Village of Sterling, including Plaintiffs, of the project. At one such meeting in 1976, the issue of the potential impact upon surrounding private wells was discussed, with representatives of the Ohio Department of Natural Resources suggesting the need to attempt to minimize that anticipated impact.

The Court of Appeals also summarized the nature of the homeowners' claims in that state proceeding:

> On January 4, 1994, [Plaintiffs] filed suit against the City, alleging that they suffered damages as a result of the City's use of the wellfield. Specifically, they claim that the aquifer from which they

> draw has been lowered due to the City's pumping of huge amounts of water, forcing them to endure water shortages and poor quality water, as well as forcing them to drill new wells and purchase new pumps and water softening equipment. [Plaintiffs'] First Amended Complaint asserts two claims. The first claim alleges that the City caused unreasonable harm to [Plaintiffs] as a result of its pumping of groundwater from the wellfield. The second claim alleges that [Plaintiffs] will suffer irreparable harm in the future and that [Plaintiffs] have no adequate remedy at state law. [Plaintiffs] pray for both damages and an injunction.

Id. The trial court granted summary judgment to the City on statute of limitations and sovereign immunity grounds. Employing somewhat different reasoning, the Court of Appeals affirmed, holding that, pursuant to Ohio Revised Code §2744.03(A)(3) and (5), the City was immune both from the landowners' prayer for damages and from their prayer for an injunction. *McNamara,* 707 N.E.2d at 977. On April 7, 1999, the Supreme Court of Ohio dismissed the appeal as improvidently allowed. *McNamara v. City of Rittman,* 707 N.E.2d 943 (Ohio 1999).

On December 7, 2000, Plaintiffs filed a federal Complaint, alleging essentially the same facts as in their state action.[1] Plaintiffs assert that these facts demonstrate

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[1] Plaintiffs' federal Complaint appears to be different than their state Complaint in at least two respects: first, Plaintiffs here seek only damages, while in state court they also sought an injunction; second, Plaintiffs here allege that the interruption of water service to Plaintiffs' homes was intentional, a claim they did not explicitly make in state court. The Court does not find it necessary to address these differences in order to rule on Defendant's motion.

both a violation of Plaintiffs' procedural due process rights as well as a taking without just compensation.[2] Accordingly, they seek relief pursuant to 42 U.S.C. §1983.

Defendant moves for summary judgment, advancing a number of arguments: First, that Plaintiffs' claims are barred by res judicata; second, that they are barred by the statute of limitations; third, that the Complaint fails to state a federal claim because there is no federal right to draw underground water from a private well; fourth, that the Court should abstain under *Buford v. Sun Oil Company*, 319 U.S. 315 (1943); fifth, that relief under §1983 is not appropriate because Plaintiffs received full adjudication of their claims in state court; and sixth, that Plaintiffs' takings claim is not ripe.

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[2] Although Plaintiffs affirmatively (and repeatedly) limit their allegations to these two claims, (*see* Pl. Mem. Contra at 2, 6), their Complaint makes passing reference to substantive due process and the Ohio Constitution as well. (Compl. ¶17.) To the extent that the Complaint purports to state a violation of substantive due process, that generalized claim can provide Plaintiffs no independent relief, where, as here, it is grounded on the same underlying injury as Plaintiffs' takings claim. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (finding that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))). To the extent that the Complaint alleges a claim under the Ohio Constitution, the Court declines to exercise its supplemental jurisdiction over that claim, having disposed of all federal claims. 28 U.S.C. §1367-(c)(3).

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories,

and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

III. ANALYSIS

A. *Property rights in groundwater use.*

The Court must first determine whether access to groundwater is a property right on which takings or procedural due process claims may lie. What constitutes a "property right" is not determined by looking to the Constitution, rather, these rights are created by "independent sources, such as state law." *Arnett v. Myers*, 281 F.3d 552, 565 (6th Cir. 2002) (citation omitted). In *Cline v. American Aggregates Corp.*, 474 N.E.2d 324 (Ohio 1984), the Ohio Supreme Court adopted §858 of the Restatement of Torts (Second) to set out the common law rights of landowners with regard to groundwater. *Cline*, 474 N.E.2d at 327. Section 858 applies a "reasonable use" doctrine, which provides that landowners are liable for interference with groundwater only if their use is unreasonable or causes unreasonable harm to others who are entitled to the water. Restatement (Second) of Torts §858 (1979).

The question is whether §858, and ultimately *Cline*, describes a property interest in groundwater. One federal court, relying on an Ohio Court of Appeals' decision, has held that it does not. *See Hensley v. City of Columbus*, No. C2-99-888 (S.D. Ohio May 23, 2002) (relying on *Smith v. Summit County*, 721 N.E.2d 482 (Ohio Ct. App. 1998)). The *Smith* Court found that §858 established rights exclusively in tort, not in property. *Smith*, 721 N.E.2d at 485-86. It based its decision, in part, on the phrasing of the section itself, noting that it is set out in terms of nonliability, rather than granting "title" in groundwater. *Id.* If this Court were to follow *Smith*, Plaintiffs' claims would be subject to dismissal on that ground alone.

The Court is disinclined to adopt *Smith*'s reading of §858 and *Cline*, however. The Restatement itself recognizes that [a] n unprivileged interference [in water rights] is a tort, although, like a trespass or nuisance, it is a tort directed at an interest in property." Restatement (Second) of Torts (ch. 41 introductory note and scope note); *see also id.* §858, cmt. b (noting that the right to withdraw groundwater is a "property right" and that Section §858 "retains the property basis of the common law rules pertaining to ground water"). Absent some controlling authority to the contrary, this Court is not prepared to believe that the Ohio Supreme Court would find, as the Court of Appeals did in *Smith*, that access to groundwater for domestic use is not connected to enjoyment of the overlying land. *Cf. State ex rel. Royal v. City of Columbus*, 209 N.E.2d 405 (1965) (finding that frequent low flying aircraft may constitute taking when flights cause a "direct and immediate interference with enjoyment and use of land"). The Court, thus, is inclined to believe that the interest at stake is sufficiently bound up in notions of property that it may support Plaintiffs' takings and due process claims. Because the Court concludes that Plaintiffs' claims must be dismissed on other grounds, the Court ultimately need not decide this question, however, and, thus, declines to do so.

B. *Takings claim.*

The Court finds, nevertheless, that Plaintiffs' takings claim is barred by the statute of limitations. Section 1983 actions accrue " 'when the plaintiff knows or has reason to know of the injury which is the basis of the action.' " *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) (quoting *Seveir v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)). Federal

courts adjudicating §1983 actions borrow the forum state's general personal injury limitations period. *Wilson v. Garcia*, 471 U.S. 261 (1985). In Ohio, pursuant to Ohio Rev. Code §2305.10, this period is two years.

Defendant asserts that Plaintiffs must have known about the alleged injury which is the basis of their action not later than January 4, 1994, the day they filed their state court action, so that the statute of limitations expired, at the latest, on January 4, 1996. Since Plaintiffs did not file their federal Complaint until December 7, 2000, Defendant asserts that Plaintiffs' claims are presented almost four years too late.

Plaintiffs do not dispute that the appropriate statute of limitations is two years. Instead, they assert that their takings claim did not accrue until they were ultimately denied relief by the state courts in their effort to obtain a remedy in tort. The statute of limitations, they argue, did not begin to run until the Ohio Supreme Court dismissed their tort-claim appeal on April 7, 1999. Because they filed their federal Complaint within two years of that date, Plaintiffs argue that their federal claims are timely.

Plaintiffs rely on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and *Kruse v. Village of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996), to support their position. In *Williamson County*, the Supreme Court found that a takings claim is not ripe until it is determined (1) that the state actor has made a final decision regarding the activity underlying the alleged taking; and (2) "that if the state had a 'reasonable, certain, and adequate provision for obtaining [just] compensation . . . at the time of the taking,' just compensation was sought and denied through that procedure." *Arnett v. Myers*, 281 F.3d at

562 (quoting *Williamson County*, 473 U.S. at 194). The first prong is not in dispute; the parties agree that the final decision was made to operate the wells, despite the known potential impact upon Plaintiffs' property, by no later than 1980, when the wells became operable. The parties disagree, however, on the application of *Williamson County*'s second prong to this case.

The Sixth Circuit, applying *Williamson County*'s second prong in Ohio, found that the state does not have a "reasonable, certain, and adequate" provision for obtaining just compensation. *Kruse*, 74 F.3d at 698. In *Kruse*, the plaintiffs' backyard was destroyed by a village's street-widening program. *Id.* at 696. When the plaintiffs filed an action for trespass in state court, the Court of Appeals found that the land rightly belonged to the plaintiffs, but that the Village was immune from damages or injunctive relief. *Id.* at 696. The plaintiffs subsequently brought takings and procedural due process claims in federal court. The trial court, however, dismissed both claims because the plaintiffs did not pursue inverse condemnation remedies through a writ of mandamus. *Id.* at 696-97. The Sixth Circuit reversed, holding that Ohio had no explicit statutory procedures governing inverse condemnation and that the mandamus procedure through which a plaintiff might receive post-deprivation compensation was "confusing and uncertain at best." *Id.* at 698. Because no adequate state post-deprivation remedy existed, the Sixth Circuit found the plaintiffs' claims ripe. *Id.* at 701.[3]

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[3] A recent Sixth Circuit panel has suggested that *Kruse* may only be applicable to cases involving physical, as opposed to regulatory, takings. *See Tri-Corp. Management Co. v. Praznik*, No. 00-4326, 2002 U.S. App. LEXIS 6199 (6th Cir. March 29, 2002)

[footnote continued]

Plaintiffs assert that, under *Kruse, inverse condemnation* remedies need not be pursued before a federal takings claim is ripe, but Plaintiffs must still pursue *other* judicial remedies in state court (or assert the inadequacy of those remedies) before their takings claim would ripen. Plaintiffs point out that, in *Kruse,* the plaintiffs pursued a state remedy – trespass – that was unrelated to "inverse condemnation" before bringing their federal takings claim. Because of the delay caused by pursuing the state trespass suit, Plaintiffs note that "the defense of the statute of limitations would have been available" against the *Kruse* plaintiffs in federal court. (Pl. Mem. Contra at 21.) Plaintiffs here argue that the only way the *Kruse* plaintiffs' claims would have been timely is if the Sixth Circuit considered those claims to be unripe until the state court dismissed their trespass claim. In this respect, Plaintiffs argue that they are in precisely the same position as the plaintiffs in *Kruse,* and argue that this Court should reach precisely the same result as the Sixth Circuit did in that case. At bottom, this argument relies on a seemingly logical premise: If Plaintiffs had been successful in their state action for tort, they would not be entitled to sue in federal court on a takings theory, because they would have received "compensation" for

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(noting arguable inconsistency between *Kruse* and *Silver v. Franklin Township, Board of Zoning Appeals,* 966 F.2d 1031 (1992)). Because the allegations in this case are appropriately characterized as physical takings, *see Tularc Lake Basin Water Storage District v. United States,* 49 Fed Cl. 313, 319 (Fed. Cl. 2001), the Court applies *Kruse* to Plaintiffs' claims. Even if *Kruse* were *not* applicable, however, Plaintiffs would not be entitled to relief: Absent *Kruse,* the Court would simply apply the basic rule that a plaintiff must pursue inverse condemnation proceedings before its federal takings claim ripens. *See Silver,* 966 F.2d at 1035. Since Plaintiffs here have not done so, their claims would not be ripe.

the deprivation. Accordingly, Plaintiffs argue, this Court could not assess whether a "taking without just compensation" occurred without knowing whether the state would have compensated the Plaintiffs in tort.[4]

The Court agrees with Plaintiffs that the claims at issue in *Kruse* appear vulnerable to a statute of limitations attack. The problem, however, is that the Court of Appeals never addressed that issue. While a statute of limitations defense was raised in the trial court, the district judge declined to address it because he found the case susceptible to dismissal on other grounds. Because there was no cross appeal filed, the issue was simply not presented to the Court of Appeals. This Court, accordingly, cannot draw meaningful conclusions about how the *Kruse* Court would have addressed a statute of limitations defense if such a defense were before it.

In any case, neither *Williamson County* nor any subsequent takings case law holds that a plaintiff must pursue *all conceivable means* of remedy before a federal takings claim is ripe. Taken to its logical extreme, this position would require pursuit if any number of conceivable strategies – not only, for example, advancing

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[4] Although Plaintiffs' Complaint alleges that no adequate state law remedy exists because the City of Rittman is immune from tort liability, (Compl. ¶14), it does not expressly allege that Ohio's inverse condemnation procedures are inadequate. In a regulatory takings context, the Sixth Circuit has recently found that when a Complaint contained no allegations with regard to the adequacy of inverse condemnation procedures, a plaintiff's takings claim is not ripe for review. *See Tri-Corp Management Co. v. Praznik*, No. 00-4326, 2002 U.S. App. LEXIS 6199 (6th Cir. March 29, 2002). *But cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reiterating that notice pleading is sufficient). Because Defendant has not raised this issue, and in light of the Court's ultimate decision on this claim, however, the Court need not address the adequacy of the Complaint in this respect.

all possible judicial claims (negligence, nuisance, trespass, due process) – whether or not those claims are themselves untimely or otherwise subject to well-established defenses – but also, perhaps, seeking private legislation at the state level – before a federal takings claim would ripen. This is not the law. *Williamson County* requires only that a plaintiff attempt to obtain just compensation for a taking through procedures designated for that purpose. *Williamson County*, 473 U.S. at 194-95. Where that procedure is deemed inadequate, as it has been in Ohio, *see Kruse*, 74 F.3d 698, then a takings claim is ripe immediately. *See Arnett*, 281 F.3d at 562 (finding takings claim ripe because taking occurred prior to Tennessee statute establishing inverse condemnation procedures); *see also Retirement Management Co. v. City of Wickliffe*, No. 99-CV-1058 (N.D. Ohio January 14, 2000) (finding that because Ohio inverse condemnation procedures are inadequate uuder *Kruse*, plaintiff's federal claim is ripe).

Accordingly, the Court finds that Plaintiffs' takings claim ripened immediately when Plaintiffs knew or should have known of the underlying injury. Plaintiffs must have acquired this knowledge no later than when Plaintiffs filed their state court Complaint. *See Conlin v. Blanchard*, 890 F.2d 811, 815 (6th Cir. 1989). Because the statute of limitations on §1983 claims in Ohio is two years, and because Plaintiffs did not file their takings claim in federal court until six years after they filed their state Complaint, their takings claim is barred by the statute of limitations.

At a minimum, Plaintiffs should be chargeable with an understanding that they had a ripe federal claim by the confluence of events consisting of the Sixth Circuit's January 1996 decision in *Kruse* and the dismissal of their

state tort claims in May 1996 on both timeliness and immunity grounds. Again, because those events occurred some four years before this action was filed, this action is time-barred.[5]

B. *Procedural due process claim.*

Defendant also argues that Plaintiffs' procedural due process claim is barred by the statute of limitations. In response, Plaintiffs employ a legal theory similar to the theory they employed with regard to their takings claim: They argue that the procedural due process claim did not accrue until they were denied the judicial postdeprivation remedies they sought through tort. Tort remedies are regularly considered by courts when analyzing whether postdeprivation remedies are adequate for procedural due process purposes. *See Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (noting that availability of state tort claim for deprivation of property is "sufficient to satisfy the requirements of due process"); *Zinerman v. Burch*, 494 U.S. 113, 126 (1990) (noting that inquiry includes examination of "any remedies for erroneous deprivations provided by statute or tort law"); *National Communication Systems, Inc. v. Michigan Public Service Commission*, 789 F.2d 370, 373 (6th Cir. 1986) (considering adequacy of state common law remedy for "malicious destruction of property" in determining whether postdeprivation remedies were adequate under *Parratt*). Plaintiffs assert, accordingly,

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[5] At bottom, Plaintiffs are asking this Court *both* to permit them to avoid pursuit of an inverse condemnation action in state court before resort to this forum *and* to deem their filing of a defective state court claim sufficient to toll the statue of limitations on an injury which occurred some twenty years earlier; Plaintiffs simply ask too much.

that their procedural due process claim could not have ripened before they sought, and were denied, tort damages. Finally, because Plaintiffs' tort claims were dismissed on immunity grounds, they argue that the postdeprivation remedies are inadequate. *See Hudson v. Palmer*, 468 U.S. 517, 536 (1984) (raising, but not deciding, issue of whether immunity would make tort remedy "inadequate"); *National Communication Systems*, 789 F.2d at 373 (same).

Although Plaintiffs vociferiously argue that postdeprivation remedies in this case are *inadequate*, they have not demonstrated that those remedies are *relevant* to their case. Postdeprivation remedies are only relevant to a procedural due process claim when a predeprivation hearing is impracticable. That is, to the extent that the city could have, and should have, given Plaintiffs notice and an opportunity to be heard *before* depriving them of their groundwater, the concrete due process injury has already occurred by the time the actual deprivation is complete.

The Supreme Court has found several circumstances under which predeprivation hearings are not practicable and postdeprivation remedies must be sought. For instance, if the City was acting as a result of a need for "quick action," such as reacting to an emergency situation, then predeprivation hearings are not required. *Parratt v. Taylor*, 451 U.S. 527, 539 (1981); *see also Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994). As well, if the deprivation was caused by a random or unauthorized act of a state employee, then it is inappropriate to demand that the state hold a predeprivation hearing; a plaintiff must pursue postdeprivation remedies. *See id.* at 541 (noting that when deprivation results from random, unauthorized act, "[i]t is difficult

to conceive of how the State could provide a meaningful hearing before the deprivation takes place").

But Plaintiffs do not demonstrate that these circumstances, or analogous ones, were present here. No emergency or need for quick action existed which would have made a hearing impracticable. Not only was the action causing the Plaintiffs' injury authorized, but Plaintiffs allege that the conduct was intentional – that the City knew that the wells would cause harm to Plaintiffs but drilled them there anyway. (Compl. ¶ 15; Pl. Mem. Contra at 5.)[6] Under these circumstances, applying *Parratt* is inappropriate. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (noting that where a deprivation results from conduct pursuant to an established state procedure or policy, postdeprivation remedies do not satisfy due process); *Moore v. Board of Education of Johnson City Schools*, 134 F.3d 781, 785 (6th Cir. 1998) (noting that where deprivation not random or unauthorized but rather pursuant to established procedures, plaintiff required "neither to plead nor prove the inadequacy of [postdeprivation] state law remedies"). Accordingly, postdeprivation remedies are irrelevant: Plaintiffs' procedural due process claim ripened, at the latest, at the time of the deprivation.[7]

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[6]Indeed, it appears that Plaintiffs were privy to the information regarding the potential impact on their water supplies which they now claim the City should not have ignored. In such circumstances, it would appear that Plaintiffs had several years within which to take action or seek compensation for an anticipated taking before the wells were operable. Instead, Plaintiffs waited some fourteen years after operations began, and, by their own admission, between six and eleven years after experiencing clearly identifiable harm to their water supply, before even proceeding to state court.

[7]It is more than arguable, however, that Plaintiffs had more than adequate opportunities to seek pre-deprivation process, but failed to avail themselves of those opportunities.

The ultimate result, under the circumstances presented here, is that ripeness with regard to Plaintiffs' procedural due process claim mirrors ripeness of their takings claim. This result is consistent with the line of decisions that suggest that when a procedural due process claim is raised along with a takings claim, the Court should ordinarily apply identical ripeness requirements to both claims. *See Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154 (6th Cir. 1992) (finding that ripeness inquiry for ancillary procedural due process claim is altered when presented along with takings claim so that ripeness analysis for both claims is identical); *see also Arnett v. Myers*, 281 F.3d 552, 562-63 (same); *see also Kruse*, 74 F.3d at 697-701 (not differentiating procedural due process claim from takings claim in ripeness inquiry).

Plaintiffs' procedural due process claim, like their takings claim, ripened immediately when Plaintiffs knew or should have known of the underlying injury. Plaintiffs must have acquired this knowledge no later than when Plaintiffs filed their state court Complaint. Because the statute of limitations on §1983 claims in Ohio is two years, and because Plaintiffs did not file their procedural due process claim in federal court until almost five years after they filed their state Complaint, that claim, like their takings claim, is barred.

For the foregoing reasons, the Defendant's motion for summary judgment is **GRANTED** and this case is **DISMISSED.**

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

[EXCERPTS]

[0116]

INVESTIGATION OF GROUND WATER LEVELS IN THE VICINITY OF STERLING, WAYNE COUNTY, OHIO

OHIO DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER
GROUND WATER RESOURCES SECTION

PREPARED BY JIM RAAB, BILL HAIKER,
REBECCA PETTY AND DAVE CASHELL
JUNE, 1993

[0117]

INTRODUCTION

In the early 1970's, the City of Rittman, located in Milton Township of Wayne County, decided their present wellfield would be insufficient to meet the future water needs of the growing city. A new wellfield site was selected approximately one quarter mile west-southwest of the Village of Sterling, also located in Milton Township, Wayne County. Figure 1 shows the location of the new wellfield and the surrounding area.

Concerned about potential impacts to existing private water wells in the vicinity of the Village of Sterling, the Milton Township Trustees conducted a meeting in

Sterling in June, 1976. Representatives of the ODNR-Division of Water-Ground Water Resources Section (GWRS) attended this meeting and stated that pumping the wellfield would lower water levels in the area. They also advised the City of Rittman to attempt to minimize the effects of pumping the wellfield on the surrounding private wells. On April 10, 1979, equipment was installed on an observation well to continuously record ground water levels in the wellfield. Monthly water-level monitoring was also begun in several private wells surrounding the wellfield.

Three large diameter production wells were completed for the City of Rittman at the new wellfield site in September, 1979. Production at the new wellfield commenced in January, 1980. Ground water level data collected by the GWRS documented that, as expected, water levels were lowered in response to pumping in the new wellfield. Approximately 15 wells within the Village of Sterling experienced pumping difficulties within the first 12 months of wellfield operation. Residents in and around the Village of Sterling were upset by the lowering of the water levels and believed the City of Rittman should be held accountable for any detrimental effects from their wellfield.

* * *

[0119]

In August, 1992 a Sterling resident contacted the GWRS expressing concern that a number of wells in Sterling were experiencing problems and requested technical assistance in determining the current water level situation in and around the Village of Sterling. Since 1980, approximately 58 wells have been drilled or redrilled in

the Sterling area. This report discusses our findings to date.

Geology and Hydrogeology

A review of the well logs and other hydrogeologic data on file with the GWRS indicates that both the City of Rittman's wells and the private residential wells are developed in a northwest to southeast trending buried valley. This ancient valley existed prior to glaciation but was subsequently filled with Illinoian and Wisconsinan age glacial deposits. These glacial deposits include an upper zone, generally less than 60 feet thick, comprised of thin lenses of sand and gravel interbedded in a clay-rich till. Underlying this deposit is a relatively thick sequence of glacial meltwater deposits. These outwash deposits can range from 100 to 150 feet thick and consist predominantly of relatively clean sand and gravel with minor to moderate amounts of silt and clay. Properly constructed wells in these deposits can yield over 500 gallons per minute (gpm) (Crowell, ODNR, 1979).

The uppermost bedrock formation within the study area is the Cuyahoga Formation, which was deposited during the Mississippian Period (320-360 million years before present). The Cuyahoga Formation consists of interbedded sandstone and shale bedrock. While generally adequate amounts of water (10 to 25 gpm) can be obtained from wells drilled into the bedrock away from the buried valley, the overlying sand and gravel aquifer provides a much better source of water within the study area.

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(2)

No. 06-1481

FILED
JUN 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

HARRY McNAMARA, *et al.*,

Petitioners,

v.

THE CITY OF RITTMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JACK R. BAKER
Counsel of Record
MEL L. LUTE, JR.
BAKER, DUBLIKAR, BECK, WILEY & MATHEWS
400 South Main Street
Canton, Ohio 44720
(330) 499-6000

Attorneys for Respondent

209412

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a Fifth Amendment takings claimant must first seek compensation in state court under state takings law, including state common law tort remedies, as a necessary step before bringing a federal takings claim in federal court?

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Williamson County Planning v. Hamilton Bank, 473 U.S. 172 (1985), as applied by the District Court and affirmed by the Sixth Circuit serves as an appropriate means of determining the accrual of the petitioners' cause of action. At its core, the petitioners seek to eliminate the state litigation rule requiring state specific action before proceeding directly to Federal Court. The elimination of a requirement that litigants first bring actions in state court creates far more problems than any alleged inconsistency in the application of *Williamson County.*

A threshold question in any Federal takings action is whether or not the case is ripe for review, for if it is not, the court lacks jurisdiction to hear the case. *Williamson County*, 473 U.S. at 194-95. This ripeness requirement is an initial screening mechanism that secures the integrity of the federal judiciary from being flooded by claims of ambiguous origins which have not been clarified by state courts. Moreover, aggrieved takings plaintiffs may needlessly come into Federal Court asserting claims for which they very well could have been compensated under state proceedings designed specifically to address their concerns. For example, in this case it was absolutely necessary for the plaintiff to proceed in the state court first, because Ohio law on the issue of groundwater rights was in need of clarification. As was demonstrated below by the Sixth Circuit certification of the question relating to groundwater rights to the Ohio Supreme Court, state processes were absolutely essential to the adjudication of this specific takings case. One must ask how there can be a taking under the Fifth Amendment unless the petitioners have a right to groundwater in the first instance. In order to satisfy the basic premise of constitutional claims, an action in state court was required under the circumstances.

Requiring the litigants to pursue reasonable and adequate processes for compensation within the State of Ohio was absolutely needed in this case because the Federal Court would otherwise have had no basis upon which to decide the matter. If there was no state litigation rule, and the petitioner first filed in Federal Court, the District Court would have had no basis upon which to determine that there was a taking. How could the petitioner's property be taken without just compensation if the state court had not first determined that there was a constitutional right to groundwater? Consequently, the initial federal inquiry is tethered to the state's scheme by design, in every case.

A. THE OUTCOME REACHED BY THE SIXTH CIRCUIT IS NOT THE RESULT OF A "LACK OF DEFINITION" OF THE *WILLIAMSON COUNTY* REQUIREMENT, BUT RATHER A REFLECTION OF HOW OHIO LAW RELATING TO "TAKINGS" AND GROUNDWATER HAS EVOLVED

1. The Timing of the Application of the State Litigation Rule, Not a Lack of Definition, Produced the Result about Which the Petitioners Complain

The "lack of definition" of the state litigation rule promulgated in *Williamson County* relied upon by the petitioner as a basis for the court's need for review is most certainly not the basis for the outcome which resulted in the Sixth Circuit. The alleged "perverse" outcome where past claims were barred by the statute of limitations, but continuing or current violations were deemed premature, is a function of the timing of the application of the *Williamson County* doctrine – not an ambiguity in the doctrine itself.

As indicated by the Sixth Circuit below, the "central inquiry after *Williamson County*, therefore, is whether or not the state compensation procedures are reasonable, certain, and adequate." *Id.* at 194. This inquiry is necessarily time specific, because a state may have inadequate compensation procedures at one point in time, but these may at a later date be rectified by statute through evolution of the common law. *McNamara, et al. v. Rittman*, 473 F.3d at 638.

2. Ohio Takings Law Materially Developed During the Pendency of This Controversy

Before the decision in *Levin v. City of Sheffield Lake*, 70 Ohio St. 3d 104 (1994), wherein the Ohio Supreme Court made explicit the ability of a mandamus action to force appropriation proceedings, there was no adequate, certain, or appropriate provision in Ohio for obtaining compensation for an alleged taking. *See Coles v. Granville*, 448 F.3d 853, 861 (6th Cir. 2006); *see also Kruse v. Village of Chagrin Falls*, 74 F.3d 694 at 701 (6th Cir. 1996). Thus, prior to the *Levin* decision in 1994, *Williamson County* had little impact on takings claim brought in Ohio, as such claims were immediately ripe for review. *Id.*

There is nothing "perverse" about applying the *Williamson County* rule where state law evolves over time, and plaintiffs' past claims and continuing or current claims are located at vastly different points on the state law time continuum. As pointed out by the Sixth Circuit, the decade of the 1990's was a time of "change and development" in Ohio takings law. *McNamara, supra*, at 638. Although before 1994, there was no adequate procedure under Ohio law for compensation of persons aggrieved by a taking, decisions subsequent to *Levin*, have created a rather extensive and

reliable doctrine, including a state statute and a mandamus cause of action. Ohio Revised Code §§ 163.01-163.62 provide a statutory mechanism by which a governmental actor seeking to take property is under a duty to bring an appropriation proceeding against the landowner. *See* Ohio Rev. C. §§ 163.01 - 163.62; *see also Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59 (2002). Additionally, a property owner who believes that his property has been taken in the absence of such an appropriation proceeding may initiate a mandamus action in an Ohio court to force the government actor into the correct appropriation proceeding. *Coles v. Granville*, 448 F.3d 853, 861 (6th Cir. 2006).

The Sixth Circuit noted in *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002), that "*Williamson County* specifically instructs that the relevant time frame for determining the adequacy of state provisions for obtaining just compensation for an alleged taking is 'at the time of the taking'". *Id.* at 563. Because Ohio law has evolved over time, and *Williamson County*'s directive applies at the time of the taking, different outcomes regarding accrual are not only understandable, but inevitable. This is particularly true where you have over 50 plaintiffs with individual residential water wells experiencing varying levels of alleged impact over the course of 20 years.[1] In fact, one would not expect the law to remain static forever, particularly the law involving an increasingly scarce natural resource.

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1. The municipal wells operated by the respondent, City of Rittman, went online in 1980, and the plaintiffs' complaints began soon thereafter. Discovery in the state law case indicated that many wells were shallow and some were actually dug by hand, with all of them drawing water very close to the surface. Some wells went dry in the 1980's and some in the 1990's, although quality issues relating to the water were not claims which were pursued in state court.

3. Ohio Law Relating to Underground Water Changed Fundamentally During the Pendency of the Petitioners' Claims

As an example of how time can have a significant impact on claims, consider how Ohio's law regarding groundwater rights evolved in the 1980's and 1990's. For over 100 years, tne law had not recognized correlative rights in underground water. *See Frazier v. Brown*, 12 Ohio St. 294 (1861). Then, the decision in *Cline v. American Aggregates*, 15 Ohio St. 3d 384 (1984) came along recognizing correlative rights in underground water, and soon thereafter the Ohio Legislature enacted Ohio Rev. Code § 1521.17, establishing a matrix for determining compensation for the unreasonable use of groundwater. Finally, the Ohio Supreme Court in response to a certified question from the Sixth Circuit recognized a constitutional right to underground water. *See McNamara, et al. v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007). Given the evolution of groundwater law in Ohio, the legal options of property owners aggrieved by the loss of groundwater have been profoundly effected by the date of the claim.

State courts are competent to adjudicate federal constitutional claims. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 549, 101 S. Ct. 764, 770, 66 L. Ed. 2d 722 (1981); *Allen v. McCurry*, 449 U.S. 90, 105, 101 S. Ct. 411, 420, 66 L. Ed. 2d 308 (1980); *Swain v. Pressley*, 430 U.S. 372, 383, 97 S. Ct. 1224, 1230, 51 L. Ed. 2d 411 (1977). As this Court has previously noted, one of the policies underlying the requirement that constitutional claims be raised in state court is to give the state court the first opportunity to rectify federal constitutional concerns related to state action. *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S. Ct. 1161, 1163, 22 L. Ed. 2d 398 (1969). Additionally, the requirement that a

party avail himself of remedies available in state court also has the practical effect of permitting development of a complete factual record in state court, to aid the federal courts in their review. *Rose v. Lundy*, 455 U.S. 509, 519, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

B. THE *WILLIAMSON COUNTY* CRITERIA ARE BASED UPON A SOLID FOUNDATION AND SERVE TO SCREEN OUT CASES THAT ARE NOT IN THE PROPER POSTURE

The rationale behind *Williamson County* is founded in very solid precepts of federal law. In *Parratt v. Taylor*, 451 U.S. 527 (1981), the U.S. Supreme Court articulated the reasoning behind requiring a meaningful post-deprivation process in state courts for alleged violations of the Just Compensation Clause. Actions brought by aggrieved individuals alleging a "taking" at the pre-deprivation stage would simply be unworkable.

> It would be impossible or impracticable to provide a meaningful hearing before the deprivation. *Id.* at 530. The state action necessary to state a claim of taking under the Just Compensation Clause is not complete 'unless or until the state fails to provide an adequate post-deprivation remedy for the property loss.' *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

So, again, the focus is on the state's individual statutory or common law scheme "at the time of the alleged taking." *Arnett, supra*, at 563. Consequently, it is the timing of the application of the *Williamson County* rule that has created the outcome which the petitioner labels "perverse".

The petitioners seek to lower or remove the threshold requirement of state litigation, effectively resulting in the bringing of alleged takings cases at the "pre-deprivation" stage. Contrary to petitioners' assertion that there is confusion and uncertainty in the federal courts, more recent decisions have reinforced the application of *Williamson County's* second ripeness requirement. *See Pascoag Reservoir & Dam LLC v. Rhode Island*, 337 F.3d 87, 91-92 (1st Cir. 2003); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002); *McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2nd Cir. 1995). Accord, *The Demise of Federal Takings Litigation*, Author Stewart E. Sterk, William and Mary Law Review (October, 2006).

It is well-settled law that federal courts should abstain from exercising jurisdiction over certain claims where resolution of state law questions would obviate the need for federal court litigation. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). It is appropriate for a federal court to abstain from exercising jurisdiction in favor of a state's interest in carrying out its domestic policy. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). The abstention doctrine is meant to express "scrupulous regard for the rightful independence of the state governments" and to assist efficiency of the federal judiciary. *Pullman*, 312 U.S. at 501, citing *Cavanaugh v. Looney*, 248 U.S. 453, 457; *DiGiovanni v. Camden Ins. Assn.*, 296 U.S. 64, 73.

1. The Recent Decision in *San Remo Hotel* Represents the Logical Application of *Williamson County* Ripeness Doctrine

Access to the federal courts in takings cases has become more restrictive of late, as evidenced by the much heralded decision of *San Remo Hotel L.P. v. City and County of San Francisco*, 125 Supreme Court 2491, 2496 (2005). In *San Remo*, the plaintiffs brought suit in state court regarding an "as applied" fee ordinance by the defendant political subdivisions. The plaintiffs framed the claims as state constitutional claims and sought to preserve their Federal takings claims for later adjudication by explicitly making an England Reservation.[2] Ultimately, the California Supreme Court heard the case and noted that there was no Federal question presented or decided. The court analyzed the takings case based both on California Law and U.S. Supreme Court law. *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th, 643, 649 (California 2002). When the plaintiffs filed suit in Federal Court (consistent with the England Reservation) the District Court dismissed the case, and the Ninth Circuit affirmed, holding that:

> California takings law is co-extensive with federal takings law and that issue preclusion prevented the plaintiffs from re-litigating takings claims in Federal Court. *San Remo*, *supra*, 364 F.3d at 1098-99.

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2. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) (A plaintiff who initially raises a federal claim in federal court but is met with an abstention doctrine that requires litigation of some issues in state court may reserve the right to litigate federal issues later in federal court).

To resolve an alleged conflict with *Santini v. Connecticut Hazardous Waste*, 342 F.3d 188 (2nd Cir. 2003), the United States Supreme Court granted certiorari in the *San Remo* case. In *Santini*, the Second Circuit recognized an exception to the collateral estoppel preclusion of the re-litigation of state claims in Federal Court that had already been brought in state court for plaintiffs who brought those claims solely to comply with *Williamson County*'s ripeness mandate. *Santini* gave rise to the practice of state litigants in the Second Circuit explicitly informing the court and adverse parties in state court that certain Federal claims were reserved for later adjudication, known thereafter as a "Santini Reservation".

Interestingly, the United States Supreme Court not only affirmed the Ninth Circuit, but noted that:

> Federal courts are not free to disregard the full faith and credit statute in order to guarantee takings plaintiffs a day in Federal Court. *San Remo Hotel v. City and County of San Francisco* 125 Supreme Court 2491, 2507 (Rehnquist C.J. concurring in the Opinion).

Like the petitioners herein, the plaintiffs in *San Remo* complained that "according a preclusive effect to state court proceedings would unfairly restrict access to federal courts." Acknowledging the petitioner's concerns directly, the Supreme Court noted:

> Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. *Id.* at 2507.

It is difficult to read the *San Remo* decision and find any indication that the petitioner's argument for certiorari herein, favoring expansion of access to federal courts by takings litigants, has any traction in this legal environment. The petitioners' assertion that they should not be required to deal with the state court and should proceed directly to the federal court for their takings claims by right, will find no purchase in light of *San Remo.*

C. AS APPLIED, *WILLIAMSON COUNTY* HAS NOT PRODUCED OPPOSING OR INCONSISTENT RESULTS AMONG THE CIRCUITS OF THE FEDERAL JUDICIARY

1. Eliminating the State Litigation Rule Would Inhibit the Original Development of State Law

In *Samaad*, the Fifth Circuit, citing Texas caselaw establishing that offending governmental conduct constituting a nuisance would "constitute a damage or taking of property", found plaintiffs had failed to carry their burden of establishing that Texas law would unquestioningly afford them no remedy. *Id.* at 935. Noting that the local entity from which plaintiffs seek to recover should be the one to deny just compensation, the court considered the adequacy of Texas procedures as a threshold ripeness analysis pursuant to *Williamson County. Id.* at 934. *Samaad* only stands for the proposition that the *Williamson County* ripeness requirement for a Federal takings claim is not satisfied by *simultaneously* bringing a state law takings claim. *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 385 (5th Cir. 2001) (emphasis added).

In *Rockstead v. City of Crystal Lake*, 2006 U.S. App. LEXIS 32553, the district court dismissed the federal takings claims of the plaintiff, because the plaintiff had failed to seek compensation in state court. In *Rockstead*, the plaintiffs claimed that an inverse condemnation action was futile, based upon an antiquated state court decision from 1948, notwithstanding many recent changes in state wetland laws effecting property owner rights.

Upholding the district court's dismissal, the Seventh Circuit Court of Appeals offered a rationale supportive of the second prong of the *Williamson County* analysis quite apropos, considering the petitioners' requests for certiorari. Referring to the "exhaustion" of state remedies characterization of *Williamson County* ripeness doctrine as a "misnomer", the Seventh Circuit Court noted:

> A futility exception broad enough to embrace this case not only would induce owners to shoot themselves in the foot, but would reflect an exaggerated conception of the rigidity of common law doctrines, make the right to sue in federal court depend on uncertain predictions about what state courts would do in a similar case and curtail the evolution of state common law by keeping cases that challenge the existing doctrine out of state court where they could influence the law. *Rockstead* at 10.
>
> * * *
>
> . . . so, when a question of the meaning or application of the state common law doctrine is at issue, instead of asking a federal judge to guess

> what a state court is likely to do, why not ask the state court? *Id.* at 10.

See also SGB Financial Services, Inc. v. Consolidated City of Indianapolis, 235 F.3d 1036, 1038 (7th Cir. 2000).

As can be seen by the above survey of various circuit courts, the petitioners' argument herein for the abandonment of the state litigation rule appears to have little support. In fact, the judges in the circuits cited have focused on the value of state litigation as a tool for, not only determining the threshold issue of ripeness, but also encouraging the evolution and development of state law. Likewise, the rule reinforces notions of comity.[3]

2. "Exhaustion" of State Remedies Has Never Been a Requirement of *Williamson County*

The petitioners claim that the *Williamson County* state litigation rule has resulted in variation among the circuits, as applied, and the rule holds no value and should be abandoned.[4] Cases cited by the petitioners, however, do not

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3. "Comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. *Younger v. Harris*, 401 U.S. 37, 44, 91 S. Ct. 746, 750 (1971).

4. Differences in state law may result in divergent outcomes for cases brought in federal district courts in different states. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 74-77, 58 S. Ct. 817, 820-822, 82 L. Ed. 1188 (1938). Such differing results are inevitable

(Cont'd)

support the petitioners' alarmist rhetoric. The petitioners claim that the Second Circuit requires resort to state takings claims to satisfy the state litigation rule of *Williamson County* and cites *Villager Pond v. Darien*, 56 F.3d 375 (2nd Cir. 1995), *cert. denied*, 519 U.S. 808 (1996), for that proposition. *Villager Pond*, however, concerned a state takings case that "may be used as the basis for an inverse condemnation action to recover compensation for property taken from private individuals, even in the absence of a separate statutory remedy". *Id.* at 380. *See Asociacion DeSubscripcion v. Galarza*, 479 F.3d 63, 81 (1st Cir. 2007). *Villager Pond* does not establish law in the Second Circuit requiring takings plaintiffs to *exhaust* state remedies but does, however, require state takings plaintiffs to resort to the state scheme specifically designed to avoid constitutional injury. *Id.*

In *Samaad v. Dallas*, 940 F.2d 925 (5th Cir. 1991), the petitioner claims the Fifth Circuit requires resort to "all state procedures – even nuisance claims, in order to satisfy Williamson County's state litigation rule". (Page 8 of the petition for writ of certiorari.) *Samaad*, however, does not stand for the proposition that state procedures must be exhausted. In fact, the court looked to established Texas law to determine whether the plaintiff's failure to seek compensation in the state due to a futility argument was accurate. *Id.* at 935.

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and "attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). This is the nature of federal state interplay after *Williamson County*. *McNamara v. Rittman* 473 F.3d at 633 (6th Cir. 2007).

Perhaps, the case which is most illustrative of the current state of the law upon *Williamson County* was recently decided by the First Circuit in *Asociacion DeSubscripcion Conjunta DelSeguro DeResponsabilidad Obligatorio v. Juan Flores Galarza*, 479 F.3d 63 (1st Cir. 2007). In the *Asociacion* case, a plaintiff insurer asserted a takings claim against Puerto Rico's Secretary of the Treasury pursuant to 42 U.S.C. § 1983 for failing to pay over to the insurer interest accumulated on sums pursuant to Puerto Rico's compulsory liability insurance law. The First Circuit considered the matter on an interlocutory appeal from the U.S. District Court for the District of Puerto Rico of defendant's qualified immunity motion. The First Circuit focused on the fact that *Williamson County* never required an exhaustion of all possible state remedies for purposes of ripeness determination. *Williamson County*, as applied, has focused on state procedures specific to the compensation of aggrieved persons alleging a physical taking. *Id.* at 79. The key component of this prong of *Williamson County* is the availability of a process that is particularly aimed at providing compensation when government action effects a taking. *Id. See also McNamara, et al. v. Rittman*, 473 F.3d 633, 638 (6th Cir. 2007) (referring to the Sixth Circuit's focus on mandamus as "reasonable, certain, and adequate" in Ohio for takings claimants referenced in the *McNamara* decision).

The First Circuit noted:

> Such procedures do not include litigation of a state takings claim or any general remedial cause of action under state law. Rather, the Supreme Court must have had in mind only those procedures specifically designed by the state to avoid constitutional injury in the first instance by providing a means for a plaintiff to obtain compensation for the

> government's taking of property. *Id.* at 79. Requiring the plaintiffs to avail themselves of such a procedure before seeking a federal takings claim protects the state's opportunities to use the scheme it designed specifically to avoid constitutional injury. By contrast, requiring the plaintiffs to invoke any general available state procedure that might provide a remedy for an uncompensated taking before finding a federal claim would "transform" *Williamson County*'s finality rule into a rule of exhaustion". *Id. See also Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000).

The First Circuit clearly defined in the *Asociacion* case that there is no exhaustion requirement in physical takings cases. The plaintiffs need only use claims processes specifically designed to compensate aggrieved takings plaintiffs.

The *Asociacion* court directly addressed concerns relating to the application of the state litigation rule, including those arguments upon which the petitioners herein base their request for review. The court found that the state litigation rule as set forth in *Williamson County* and applied throughout the country, does not require that the plaintiffs bring state takings claims necessarily, as that is the most likely scenario to invoke crossover of state and federal issues that trigger preclusion concerns.[5] As the First Circuit points out in the *Asociacion* case:

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5. Chief Justice Rhenquist's criticism of the state litigation rule and his concerns regarding the risk of claimed preclusion raised in *San Remo* have their basis in situations where "state takings claims were brought, and state courts reached federal constitutional issues

(Cont'd)

> We consider a state takings claim to be remedial in nature, however, and not a procedure the state has provided for seeking compensation. *Williamson County*, 473 U.S. at 194. A takings claim seeks damages for the unconstitutional taking of property without due compensation. By contrast, an inverse condemnation proceeding is designed to enable the plaintiffs to obtain compensation which, if granted, would avoid the alleged constitutional violation that the takings claim is intended to remedy. This is a subtle, but important distinction. As with more general remedial provisions, requiring a state takings claim as a prerequisite to the federal takings claims effectively would impose an exhaustion requirement – which the Supreme Court explicitly said it did not do in *Williamson County*. *Id.*

Over time, the *Williamson County* ripeness requirement has become an effective means by which to ensure that takings cases based upon undeveloped or ambiguous state law do not clog the federal courts. Moreover, the doctrine has not been applied for a manner requiring takings plaintiffs to take extreme measures to "exhaust" all conceivable state remedies. As Judge O'Malley cautioned below in *McNamara*

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in the course of ruling on the plaintiff's compensation claims." *Asociacion* at 80. This concern over an overlap between state law and federal principles assumes that federal takings plaintiffs would need to pursue an available state takings claim in order to meet the *Williamson County* ripeness requirements. *Id.* at 80. *See also* Scott Keller, *Judicial Jurisdictional Stripping Mascarading As Ripeness: Eliminating the Williamson County's State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199 (2006).

v. Rittman No. 1:00-CV-3046 (N.D. Ohio E.D. August 8, 2002).

> . . . neither *Williamson County* nor any subsequent takings case law holds that a plaintiff must pursue *all conceivable means* of remedy before a federal takings claim is ripe. Taken to its logical extreme, this position would require pursuit of any number of conceivable strategies – not only, for example, advancing all possible judicial claims (negligence, nuisance, trespass, due process) – whether or not those claims are themselves untimely or otherwise subject to well-established defenses – but also, perhaps, seeking private legislation at the state level – before a federal takings claim would ripen. This is not the law. *Id.*

CONCLUSION

Revisiting the *Williamson County* criteria for determining ripeness in "takings" cases is not the answer to the myriad problems encountered by the petitioners. The outcome of the Sixth Circuit decision below, wherein past underground water claims were barred by the statute of limitations and future claims were determined to be unripe for Federal review is a direct result of where those claims fall on the time continuum of Ohio's developing underground water law. Eliminating the state litigation rule would stunt the growth of state law in critical areas where Federal and state claims intertwine. Likewise, Federal Courts would be left in many instances to speculate as to how state courts would rule when faced with "takings" claims relevant upon the interpretation of state law, were it not for the gate keeping function of the *Williamson County* criteria.

For the reasons set forth in this brief, and consistent with the law cited herein, the Respondent City of Rittman, Ohio, respectfully requests that this Honorable Court deny the Writ of Certiorari requested by the Petitioners.

Respectfully submitted,

JACK R. BAKER
Counsel of Record
MEL L. LUTE, JR.
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS
400 South Main Street
Canton, Ohio 44720
(330) 499-6000

Attorneys for Respondent

Supreme Court, U.S.
FILED
JUL 11 2007
OFFICE OF THE CLERK

No. 06-1481

In The

Supreme Court of the United States

HARRY MCNAMARA, ET AL.,

Petitioner,

v

CITY OF RITTMAN,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

Thomas J. Ward
(Counsel of Record)
Christopher M. Whitcomb
Duane J. Desiderio
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

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Other

Michael Berger & Gideon Kanner, *Shell Game! You Can't get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody State*, 36 Urb. Law. 671 (2004) 6-7

Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) 18

Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000) 7, 18

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) 18

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INTEREST OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, and historically has been, vitally concerned with judicial decisions regarding government regulation and taking of private property.

NAHB appeared before the Court as a petitioner in a case decided last month concerning the Clean Water and Endangered Species Acts, *NAHB v. Defenders of Wildlife*, No. 06-340, 551 U.S. ___, 2007 WL 1801745 (U.S. June 25, 2007). It has also participated as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous government action under a wide array of statutes and regulatory programs.[2]

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*,

In particular, NAHB has frequently asked this Court to clarify procedural and jurisdictional issues to enable the resolution of Fifth Amendment takings claims on their merits. Too often, ripeness principles and statutes of limitations are misapplied to operate as an unfair bar, denying land owners full and fair court access on constitutional takings claims. NAHB thus offers its experience in this field and a national perspective to support the Petitioners.

STATEMENT OF THE CASE

Petitioners are typical of takings claimants who have been trapped by the jurisdictional requirements that the lower courts have established in response to this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)

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503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

(*Williamson*). Their litigation odyssey exceeds thirteen years at this point, and there is no prospect that they will ever receive a decision on the merits of their Fifth Amendment takings claim from a federal court.

Petitioners live in the Village of Sterling, Ohio, and obtain their domestic water from wells. Around 1980, the City of Rittman began operating a well field outside of its boundaries and near Petitioners' homes. *McNamara v. City of Rittman*, 473 F.3d 633, 635 (6th Cir. 2007). The operation of the well field lowered the level in Petitioners' wells and degraded the quality of their water. In 1994, Petitioners first attempted to receive some form of monetary relief by bringing a state law claim for illegal "dewatering" in state court. *Id.* If they had won, no further litigation would have ensued because they would have been compensated for the City's actions. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 691 (1999); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n. 21 (1984). However, the Ohio courts ruled the City was immune from liability. *McNamara*, 473 F.3d at 633. Thus, in state court Petitioners received no decision on the merits, and no monetary award, arising from the City's taking of the water.

Having been denied monetary relief in state court, in December 2000 Petitioners then brought a Fifth Amendment takings claim for just compensation in federal court. *Id.* at 636. The district court ruled that Petitioners' federal takings claim was out of time. It believed that the physical takings claim immediately ripened in 1994, around the time that the state suit was filed, when Petitioners knew or should have known of their injuries caused by the City's dewatering. *Id.* The district court thus dismissed the Petitioners' takings claim because it should have been filed in 1996, within the applicable two-year limitations period under Ohio law. *Id.* Moreover, the district court ruled that an initial state suit to ripen a federal claim was not necessary back in 1994, because in 1996 (while the state

dewatering suit was underway) the Sixth Circuit issued an opinion in another case,[3] deciding that Ohio's inverse condemnation procedure was inadequate to compensate aggrieved landowners for takings. *Id.*

The court of appeals dismissed Petitioners' case, through slightly different reasoning. The Sixth Circuit separated its analysis into two parts, i) past violations, and ii) continuing violations. *McNamara*, 473 F.3d at 637. With respect to past violations, the court of appeals followed the district court's reasoning and explained that in 1994 Ohio's compensation procedure was inadequate, and therefore Petitioners could have brought the past violation takings claim immediately to federal court. With respect to the continuing violation, the Sixth Circuit ruled that to ripen their takings claim, the Petitioners must again return to state court and bring a mandamus action, which the Ohio Supreme Court *did* recognize as an available procedure in yet another 1994 decision. *Id.* at 637-40. Thus, in the court of appeals' view, the 2000 federal takings suit for past violations was too late, and for continuing violations was too early.

REASONS FOR GRANTING THE WRIT

I. THE STATE LITIGATION RULE AND THE *"WILLIAMSON* TRAP."

In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 340 (2005), four concurring Justices stated this Court's decision in *Williamson*, "may have been mistaken," because "[i]t is not clear ... that *Williamson County* was correct in demanding that ... the

[3] The district court relied on *Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996), a case that was not decided until two years after Petitioners first filed suit in Ohio state court.

claimant must seek compensation in state court before bringing a federal takings claim in federal court." Two years have elapsed since *San Remo*, but this Court has not yet clarified *Williamson*. As a result, takings claimants, like Petitioners here, are routinely trapped in a bizarre and arbitrary web of unclear and inconsistent ripeness requirements, and are precluded from having their claims heard in federal courts.

Williamson devised two rules to ripen Fifth Amendment takings claims. First, such claims are not ripe until government "has reached a final decision regarding application of the regulations to the property ...." 473 U.S. at 186. As the Petitioners have alleged a physical taking of their water, the finality rule is not at issue here.[4]

Williamson's second ripeness requirement is at issue: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the

[4] Though this Court has never decided this issue, the courts of appeals agree that the finality requirement is not implicated when the government physically takes a person's property. See *Asociación de Subscripción Conjunto del Seguro de Responsabilidad Obligatorio v. Galarza*, 484 F.3d 1, 15 (1st Cir. 2007) ("[T]he finality prong of *Williamson County* is inapplicable to physical takings."); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 958 (7th Cir. 2004) ("[A] physical invasion constitutes a 'final decision' and thus satisfies *Williamson County*'s first requirement."); *McKenzie v. City of White Hall*, 112 F.3d 313, 316 (8th Cir. 1997) ("A physical taking is by definition a final decision for the purpose of satisfying *Williamson*'s first requirement."); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1478 (9th Cir. 1989) ("*Williamson County*'s final decision requirement is inapplicable in cases of physical invasion.").

procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo*, the late Chief Justice Rehnquist labeled this requirement the "state-litigation rule," and described it as follows: "Until the claimant had received a final decision of compensation through *all* available state procedures, *such as* by an inverse condemnation action, he 'could not claim a violation of the Just Compensation Clause.'" 545 U.S. at 341 (citing *Williamson*, 473 U.S. at 195-196) (emphasis added). The concurrence further observed that the state-litigation rule "may have been mistaken." *Id.* at 340.

Most federal circuits have interpreted *Williamson* to mean that a Fifth Amendment takings claim is not ripe—it does not exist—until a property owner has sought and been denied compensation in state court, under state law.[5] However, after takings claimants pursue initial state litigation as *Williamson* requires, federal courts still avoid the merits of Fifth Amendment claims by dismissing them based on statute of limitations, claim preclusion, issue preclusion, *Rooker-Feldman*, abstention, or a combination of these grounds. See generally Michael Berger & Gideon Kanner, *Shell Game! You Can't get There From Here:*

[5] *Gilbert v. City of Cambridge*, 932 F.2d 51, 63-65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3rd Cir. 2006); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368-73 (7th Cir. 2000); *Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 379-80 (8th Cir. 1997); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708-709 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

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Thus, it has become the regular practice of the lower courts to bar federal takings claims brought before state court litigation as *too early*, and federal claims brought after state litigation as *too late*. This problem is called the "*Williamson* Trap,"[6] and it has ensnared the home owners in this case.

The courts of appeals have recognized the problem that *Williamson* causes to taking claimants. For example, the Sixth Circuit, in a different case, recognized that the "interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004). Similarly, the Tenth Circuit has provided that: "It is difficult to reconcile the [compensation procedures] ripeness requirement of *Williamson*" with issue and claim preclusion. *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998). Most recently, the Seventh Circuit's attempt at reconciliation was to relegate the Fifth Amendment to the "status of a poor relation"[7] by stating that: "[I]f the property owner goes through the entire state proceeding, and loses, he cannot maintain a federal suit." *Rockstead v. City of Crystal Lake*, 486 F.3d. 963, 968 (7th Cir. 2007) (Posner, J.).

Under *Williamson*, and Sixth Circuit precedent in 1994, Petitioners had to seek compensation in state court before

[6] Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000).

[7] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

they could bring a Fifth Amendment takings claim in federal court. *Infra* pp. 9-12. Yet, after Petitioners exhausted litigation in the state court to ripen their federal taking claims, the court of appeals below invoked *Williamson* to hold their claims were *too early*, and then the statute of limitations to find that their takings claims were *too late*.

Below, Amicus describes the options that the Petitioners confronted to ripen their federal takings claim when they first initiated litigation in 1994. Furthermore, Amicus explains why none of those options would have led to adjudication in federal court, thus, catching Petitioners in the *Williamson* trap. Finally, Amicus explains the conflicts that exist between *Williamson* and this Court's other precedents.

II. BASED ON THE COURT OF APPEALS' INTERPRETATION OF *WILLIAMSON*, UNDER NO SET OF CIRCUMSTANCES COULD PETITIONERS EVER OBTAIN FEDERAL COURT ADJUDICATION OF THEIR 5TH AMENDMENT TAKINGS CLAIM.

In 1994, Petitioners wanted the City to pay them for the water it had taken. So, they filed suit in state court to recoup monetary damages on their dewatering claim. Petitioners pursued this path because this is what the compensation procedures rule of *Williamson* required; if they lost in state court, then the initial state suit would have ripened their federal takings claim for subsequent adjudication to obtain just compensation in federal court. But, the court of appeals told Petitioner they chose the wrong path — in contravention of *Williamson* and its own cases interpreting *Williamson*.

The Petitioners' odyssey illustrates the problem that *Williamson* causes for claimants who want to have their Fifth Amendment arguments decided by a federal court.

Plaintiffs must guess which route will lead them to federal court, and no matter which path they follow, the federal courts refuse to reach the merits.

A. Petitioners Could Not Have Immediately Brought Their Takings Claim to Federal Court in 1994

Petitioners' most direct path to federal court (as suggested by the court of appeals) would obviously have been to file their Fifth Amendment takings claim immediately in district court. However, the Sixth Circuit's assertion that Petitioners could have brought their past violation takings claim right to federal court in 1994 is disingenuous. At that time, the Sixth Circuit routinely dismissed takings claims as unripe under *Williamson* for failure to pursue a state takings claim through Ohio's mandamus procedure — the very procedure the Sixth Circuit now claims was inadequate at the time. As early as 1985, the Sixth Circuit dismissed a federal takings claim under *Williamson* for failure to pursue Ohio's mandamus procedure.[8]

The Sixth Circuit's claim that Ohio's mandamus procedure was inadequate in 1994 is based upon the assertion that the mandamus procedure for uncompensated takings was not adequate until the Ohio Supreme Court made it explicit in *State ex rel. Levin v. City of Sheffield Lake*, 637 N.E.2d 319 (Ohio 1994). Previously, however, the Sixth circuit found a slew of earlier decisions by Ohio's appellate courts establishing mandamus as an adequate takings procedure. *Infra* pp. 10-11. In fact, *Levin* did not

[8] *See Four Seasons Apartment v. City of Mayfield Heights*, 775 F.2d 150 (6th Cir. 1985) (dismissing takings claim under *Williamson* because there was no claim that Ohio does not have "adequate inverse condemnation law permitting citizens to recover just compensation for government takings.").

fundamentally change prior Ohio precedent, which had allowed the use of mandamus by property owners to obtain compensation in certain situations. *Levin* merely reiterated that previous decisions "have held that mandamus is the vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged." 637 N.E.2d at 323. *Levin* relied upon precedent from both the Supreme Court of Ohio and the Court of Appeals of Ohio for this assertion.[9]

In the opinion below, the Sixth Circuit stated that prior to the *Levin* decision, Ohio did not have adequate compensation procedures to ripen federal takings claims. The Sixth Circuit went so far as to explain that "*Williamson*, therefore, had little impact on takings claims brought in Ohio prior to *Levin*, as such claims were immediately ripe for review." *McNamara*, 473 F.3d at 639. This is not true. The Sixth Circuit's prior decisions show that *Williamson*, in fact, was the decisive factor in rendering federal takings claims unripe prior to *Levin*.

For example, in 1991 — at least three years before the *Levin* decision — the Sixth Circuit explained, in great detail, that Ohio had a sufficient procedure for uncompensated takings:

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[9] *See, e.g., State ex rel. McKay v. Kauer*, 102 N.E.2d 703, 709 (Ohio 1951) (mandamus was the property remedy for a property owner to recover compensation for the taking of an easement by the state Highway department); *Wilson v. City of Cincinnati*, 175 N.E.2d 725, 727 (Ohio 1961) (property owner could have taken action to recover compensation from the state for a taking that had already occurred through a mandamus action); *State ex rel. Brown v. Preston*, 198 N.E.2d 90, 91 (Ohio Ct. App. 1963) (mandamus should be used to compel appropriation proceedings against the state where property has been taken without compensation).

> "[T]here is a procedure under Ohio law to obtain compensation for a taking. If a party can demonstrate that the enforcement of a zoning regulation results in an unconstitutional taking, a state court may issue a mandamus to state officials directing them to institute eminent domain proceedings to determine just compensation."

Duncan v. Vill. of Middlefield, 951 F.2d 348 (Table) 1991 WL 276270 at *3 (6th Cir. 1991). The court provided that because the property owner had an adequate state law remedy to address the taking of his property, his federal takings claim was not ripe under *Williamson.*

In 1992, the Sixth Circuit again explicitly recognized that Ohio had an adequate procedure for an unlawful taking. In *Silver v. Franklin Twp. Bd. of Zoning,* 966 F.2d 1031 (6th Cir. 1992), the Sixth Circuit dismissed a federal takings claim because the appellant failed to pursue a mandamus action in Ohio courts. The Sixth Circuit reiterated that:

> "Ohio law provides a procedure for obtaining just compensation for a government taking. If a property owner can demonstrate that the enforcement of a zoning regulation results in an unconstitutional taking, the owner may seek mandamus from a state court directing state officials to institute eminent domain proceedings to determine just compensation."

966 F.2d at 1035. The court relied upon the Ohio Supreme Court's explicit approval of the mandamus procedure for

this proposition.[10] In short, notwithstanding the court of appeals' protestations to the contrary, in earlier decisions pre-dating Petitioners' 1994 state court filing it repeatedly determined that Ohio's mandamus procedure was adequate, and that federal takings claims were unripe under *Williamson* when property owners failed to avail themselves of that procedure in state court.[11]

That the Sixth Circuit has issued conflicting decisions concerning when Ohio's mandamus procedure became available is not surprising given *Williamson*'s complexity and uncertainty. *Williamson*'s charge that federal courts must ascertain whether states have "reasonable, certain, and adequate" procedures has now resulted in contradictory and confusing precedent within the Sixth Circuit.

Petitioners took the most reasonable course by filing the state dewatering suit in 1994, given the Sixth Circuit's precedent at that time. The court below stated that Ohio did not have a "reasonable, certain, and adequate procedure" available for inverse condemnation in 1994 — but it obviously chose to ignore its own rulings, as of 1994, that a

[10] "[A] judicial solution to [an uncompensated taking] would result in legal compensation directed to the proper appropriating authority to compensate the landowner for such a taking." *Vill. of Willoughby Hills v. Corrigan*, 278 N.E.2d 658, 605 (Ohio 1972).

[11] *See also Ardire v. Rump*, 996 F.2d 1214 (Table) 1993 WL 239053 at *4 (6th Cir. 1993) ("Ohio law provides a procedure for obtaining compensation for a governmental taking; namely and action in mandamus under Ohio Rev. Code § 2731 to force the city to commence eminent domain proceedings."); *Harris v. City of Akron*, 20 F.3d 1396, 1405 (6th Cir. 1994) (dismissing Ohio claimant's federal takings claim under *Williamson*).

federal takings claim would be dismissed under *Williamson*. The only explanation for the court of appeals' failure to consider its own rulings was to prevent Petitioners from receiving a federal adjudication on the merits of their Fifth Amendment claim. Stuck between this rock and a hard place, the Petitioners reasonably believed that filing a takings claim immediately in federal court, would have been futile.

B. Seeking a Writ of Mandamus Was Not Reasonable Under Ohio Law In This Case.

1. Mandamus Would Not Have Issued

Considering the Sixth Circuit's interpretation of *Williamson* in 1994, at first glance it would seem that Petitioners best option for ripening their federal takings claim would have been to bring a mandamus action in state court. However, though the Sixth Circuit approved of Ohio's mandamus procedure in general, under the facts of Petitioners case, it is not likely that such a writ would have issued under Ohio law.

A mandamus in Ohio is "a writ, issued in the name of the state to an inferior tribunal, a corporation, a board, or person, commanding the performance of an action which the law specially enjoins as a duty resulting from an office, trust or station." Ohio Rev. Code § 2737.04. [12] However, Ohio law also provides that "[t]he writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." Ohio Rev. Code §2731.05

[12] Ohio law requires public officials to bring an appropriation action prior to the taking of private property. Ohio Rev. Code § 163.01-163.62.

In addition, in 1984, the Ohio Supreme Court changed a longstanding groundwater rule and adopted the Restatement of the Law 2d, Torts, Section 858. Section 858 provides that a landowner "who withdraws groundwater" is not liable for the "interference with the use of water by another, unless the withdrawal of the groundwater unreasonably causes harm" to a neighbor "through lowering the water table or reducing artesian pressure." *Cline v. American Aggregates Corp.*, 474 N.E.2d 324, 327 (Ohio 1984) (quoting the Restatement of the Law 2d, Torts, Section 858). Subsequently, the Ohio Court of Appeals in *Cline* affirmed the trial court's award of damages totaling $54,274. *Cline v. Am. Aggregates Corp.*, 582 N.E.2d 1 (Ohio App. 1989). Further, when Petitioners brought their state case, Ohio law was clear that "mandamus [was] not ordinarily [to] be employed as a substitute for an action at law to recover money." *Maloney v. Sacks*, 181 N.E.2d 268, 269 (Ohio 1962).

Consequently, Petitioners were faced with a set of facts that mirrored those in *Cline*, and therefore they had a viable claim based on the Restatement of Torts (*i.e.*, the unreasonable dewatering claim). A tort claim, as evidenced in *Cline*, is an "action at law to recover money." *Maloney*, 181 N.E.2d at 269. Thus, because that claim was "an adequate remedy in the ordinary course of law," a writ of mandamus would not have issued in the dewatering context. Ohio Rev. Code §2731.05.

2. Mandamus Would Have Precluded Petitioners' Subsequent Fifth Amendment Takings Claim

Finally, if the Petitioners had brought a mandamus action in state court and lost, they would have presumably ripened their federal takings claim. At the same time, however, they would have been precluded, under the doctrine of collateral estoppel, from bringing their Fifth Amendment takings claim in federal court.

Ohio courts have made clear that in mandamus actions involving the taking of property, the court must determine whether the property rights of the owner were taken by the public authority. *Levin*, 637 N.E.2d at 323, *Akron-Seller Co. v. City of Akron*, 359 N.E.2d 704, 705 (Ohio App. 1974) (explaining that in a mandamus action "it is for the court . . . to determine if there was a pro tanto taking of the owner's property without compensation."). Thus, if Petitioners had brought a mandamus action to ripen their Fifth Amendment claim, they would have been forced to litigate the issue of whether their property was taken by the City. This course of action is similar to the one that blocked the *San Remo* petitioners from federal court.

In *San Remo*, the plaintiff reserved its federal takings claim while it asked the state court to decide whether the imposition of a monetary exaction constituted a taking without just compensation. The California courts held it was not. *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002). The property owner then proceeded to federal court. The Ninth Circuit estopped the federal action under issue preclusion, finding that the state court actually and necessarily decided the principal issues comprising the federal claim. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005).

Subsequently, this Court was asked to decide "whether federal courts may craft an exception to the full faith and credit statute for claims brought under the Takings Clause of the Fifth Amendment." 545 U.S. at 326. *San Remo* also addressed whether a claimant could avoid issue preclusion by reserving a federal claim in state court under the authority of *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964). *San Remo*, 545 U.S. at 333-34.

The Court held it was "not free to disregard the full faith and credit statute solely to preserve the availability of a

federal forum" after initial state litigation mandated by *Williamson*. *San Remo*, 545 U.S. at 339. The Court further recognized that issue preclusion bars relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* at 336. "This is so even when the plaintiff would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* Moreover, the Court ruled that reserving a federal claim for later federal court review was not permissible, resolving a circuit split on this point. *Id.* at 333-34.

Accordingly, in this case, if Petitioners had brought a mandamus action, Ohio law would have required them to litigate a state takings claim. If they failed to convince the state court that their property rights were taken by the City, they would have suffered the same fate as the petitioners in *San Remo*. They would have been precluded from bringing their federal takings claim in federal court.

C. Petitioners Reasonably Believed Their Damage Claim Would Ripen Their Federal Takings Claim.

In *Williamson*, the Court provided that "if a State provides an adequate procedure for seeking compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195. The Court then cited favorably the law in Tennessee that established the procedures that the *Williamson* plaintiffs needed to follow to ripen their federal takings claim. *Id.* at 197. Those procedures allowed a property owner to "petition for a jury of inquest . . . or . . . *sue for damages in the ordinary way*." Tenn. Code Ann. § 29-16-123 (1980) (emphasis added).

In view of Petitioners' other options (described above), and the Court's decision in *Williamson*, Petitioners

reasonably decided to seek compensation in state court under a tort action. First, the Ohio Supreme Court and Court of Appeals had accepted an unreasonable dewatering claim in *Cline*. Consequently, if Petitioners were successful in state court, they would have been compensated for their damages and the litigation would have ended.[13] Second, they also believed that the tort action would ripen their federal takings claim because they had sought compensation by "su[ing] for damages in the ordinary way." *Williamson*, 473 U.S. at 197.

To conclude, in 1994 the Petitioners reasonably believed Supreme Court and Sixth Circuit precedent required them to seek monetary compensation in state court to ripen their federal takings claim. After a review of Ohio law, they chose the most reasonable option; they brought an unreasonable dewatering claim in state court.

III. *WILLIAMSON* CONFLICTS WITH THIS COURT'S OTHER OPINIONS

As shown above, *Williamson* requires taking claimants to possess psychic abilities to uncover the correct path to federal court. Moreover, *Williamson* presents takings claimants with inconsistencies within this Court's jurisprudence, which they must decipher before bringing their claim.

A. Discord on Simultaneous vs. Subsequent Takings Claims.

Tension is pronounced between *San Remo* and *Williamson*. *San Remo* held that takings plaintiffs can

[13] The district court agreed that this is a "seemingly logical premise." *McNamara v. Rittman*, No 1:00-CV-3046, slip op. at 10 (D. Ohio Aug. 8, 2002).

"simultaneously" bring federal and state takings claims in state court. *San Remo*, 545 U.S. at 338. Yet *Williamson* made clear that exhaustion of state compensation procedures is a necessary first step to ripen federal takings claims: "*until* [a plaintiff] has utilized [state] procedures, its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis supplied). Moreover, every court of appeals interpreting *Williamson* (*supra* note 10) has decided that that initial exhaustion of state court compensation procedures is a ripening prerequisite for federal takings claims.[14] How can *San Remo* and *Williamson* be harmonized, if at all? How can a Fifth Amendment claim be brought simultaneously with a state takings claim in state court (*San Remo*), when that federal claim is not ripe until after state litigation is exhausted and the state court denies compensation (*Williamson*)?

B. Anomaly with Removal Jurisdiction.

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), the Court allowed a municipal defendant to remove a federal takings claim from state to federal court, because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 163. Under the federal removal statute, a case can be removed from state to federal court only if it could have been brought in federal court

[14] Scholars agree. *See, e.g.*, Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) ("the 'ripeness' metaphor is one that promises ultimate vindication."); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) (*Williamson*'s "language ... suggests that the state law is merely preparatory to a federal suit."); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court.").

originally. 28 U.S.C. § 1441(a). But under *Williamson*, federal courts do not have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. The Eighth Circuit believes that the ironic synergy between *College of Surgeons* and *Williamson* has created an "anomalous gap ... in Supreme Court jurisprudence." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003). Does this Court intend a ripeness doctrine that prevents federal courts from deciding federal takings claims if they are initially filed in that forum by a plaintiff, but allows federal adjudication over such claims *only* when municipal defendants exercise their removal option to federal court?

Moreover, municipal defendants have been permitted to remove federal takings cases from state to federal court, and once in federal court, argue that the claims should be dismissed for lack of a prior state ripening suit. See, *e.g.*, *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003). Does this Court intend a ripeness regime that allows municipal defendants to whipsaw takings plaintiffs by removing them to federal court, and then bouncing them back to state court? How could that result possibly serve interests of judicial economy?

CONCLUSION

The options that the Petitioners faced in 1994 to try to have a federal court address their Fifth Amendment claims, their ultimate choice, the Sixth Circuit's ultimate decision and the conflicting Supreme Court opinions demonstrates how *Williamson* has created an unworkable process that leads to a single outcome—Plaintiffs cannot have their Fifth Amendment takings claims heard in federal court.

When this Court decided *Williamson* in 1985, modern takings jurisprudence was still in its infancy. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined. But the most basic, fundamental jurisdictional question—Can a federal court decide a federal takings claim?—is undeciphered.

It is no exaggeration to assert that *all* of takings law, both substantive and procedural, developed by this Court and the lower federal and state courts, hinges on clarification of the *Williamson* state-litigation rule. If this Court truly means to shield Fifth Amendment protections from federal review, respectfully, it needs to say so unequivocally. Whether federal takings claims are reviewable in federal court is a significant constitutional question, and this petition should be granted so the Court can revisit the state-litigation rule.

July 11, 2007

Respectfully submitted,

Thomas J. Ward
(Counsel of Record)
Christopher Whitcomb
Duane Desiderio
National Association of
Home Builders
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200